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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 352

JULIA THOMPSON, PETITIONER,

v.

RICHARD P. LAWSON, AS DEPUTY COMMISSIONER OF THE UNITED STATES BUREAU OF EMPLOYEES COMPENSATION, ETC., ET AL.

**A PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PETITION FOR CERTIORARI FILED SEPTEMBER 16, 1953

CERTIORARI GRANTED January 4, 1954

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TRANSCRIPT OF RECORD.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

APPEAL FROM THE UNITED STATES DISTRICT
COURT IN AND FOR THE SOUTHERN DIS-
TRICT OF FLORIDA.

PROCEEDINGS in the United States District Court
in a certain cause therein lately pending wherein
Julia Thompson is the Plaintiff and Richard P.
Lawson, as Deputy Commissioner of the United
States Bureau of Employees' Compensation, Sixth
Compensation District, Sallie Thompson, Gulf
Florida Terminal, Inc., a corporation and Ameri-
can Mutual Liability Insurance Company, are De-
fendants. Case No. 2195 Civil T.

On June 11th, 1952, The Original Plaintiff filed her
COMPLAINT in the following words and figures to
wit:

Southern District of Florida, Civil No. 2195 T.

Julia Thompson, Plaintiff,

vs.

Richard P. Lawson, as Deputy Commissioner of
the United States Bureau of Employees' Com-
pensation, Sixth Compensation District, et al.,
Defendants.

Bill of Complaint for Mandatory Injunction to set
Aside Order Rejecting Claim for Death Benefit.

Julia Thompson, the surviving widow of Otis Thomp-
son, Deceased, by and through her undersigned at-

torneys, brings this, her Bill of Complaint for Mandatory Injunction against Richard P. Lawson, as Deputy Commissioner of the Bureau of Employees' Compensation, Sixth Compensation District, of the United States Department of Labor, he being a resident of the city of Jacksonville, State of Florida; Sallie Thompson, a resident of Newark, New Jersey; Gulf Florida Terminal Company, Inc., a corporation with offices at 13th and York Streets, Tampa, Florida; American Mutual Liability Insurance Company, with offices at 367 North Orange Street, Orlando, Florida, and alleges:

I.

That this Bill of Complaint is filed by the Plaintiff for the purpose of reviewing and setting aside an order of the Honorable Richard P. Lawson, as Deputy Commissioner of the Bureau of Employees' Compensation, Sixth Compensation District, of the United States Department of Labor, entered on May 23, 1952, rejecting Plaintiff's claim for the death benefit due for the death of her husband under the Longshoremen's and Harbor Workers' Compensation Act, as enacted by the Congress of the United States on March 4, 1927, being par. 901, et seq., Title 33, of the Code of the Laws of the United States, a copy of said order rejecting claim being attached hereto, made a part hereof and marked Exhibit A.

II.

Plaintiff is the surviving wife and widow of Otis Thompson, who was injured on the 7th day of June 1951, while in the employment of Gulf Florida Termi-

nal Company, Inc., while performing service for the employer as a gang header and engaged in loading the SS "Mobilian" which was afloat in Ybor Channel, Tampa, Florida, when, as he was in the lower tween deck and guiding a sling load of dunnage to the tanks, he lost his balance and fell into the tanks, causing injuries which resulted in his death on June 15, 1951.

III .

Thereafter, the Plaintiff, as the surviving wife and widow of Otis Thompson, filed a claim with the Deputy Commissioner of the Sixth Compensation District, claiming the death benefit under the Longshoremen's and Harbor Workers' Compensation Act for herself; thereafter Sallie Thompson also filed a claim as the surviving wife and widow of Otis Thompson, claiming the death benefit; that the said Deputy Commissioner assumed jurisdiction thereof; that pleadings were filed before him and testimony of certain witnesses were taken before and submitted to him; that thereafter on the 23rd day of May 1952, the said Deputy Commissioner made findings of fact and rejected the claims of Plaintiff and Sallie Thompson; that the rejection of the claim of Sallie Thompson was based upon the fact that she was found not to be the wife of the deceased; that the rejection of the claim of Julia Thompson was based upon the Commissioner's ruling that Julia Thompson was not living with nor dependent for support upon Otis Thompson at the time of his death, as will more fully appear from Exhibit A, attached hereto, reference to which is hereby again made; that the Commissioner's ruling rejecting the claim of Plaintiff was based upon

the following facts: that Plaintiff and deceased were married January 12, 1921, and were never divorced; that Plaintiff and the minor children of the Plaintiff and the deceased were deserted by the deceased at Coleman, Georgia, about the first Monday in November 1925; that deceased went to Tampa, Florida, to live; that deceased married Sallie Williams (Thompson) in Tampa, Florida, on August 17, 1949; that Julia Thompson married Jimmy Lewis Fuller in Miami, Florida, on June 28, 1940, and was divorced by him in Ohio for desertion in 1949; that Julia Thompson has been employed by a bank in St. Petersburg, Florida, since 1943; that in 1949 Sallie Thompson went from Tampa to Newark, New Jersey, to visit a relative and secured a job; that since that time Sallie Thompson has continued to work and reside in Newark although she returned to Tampa on two or three occasions; that about three weeks before his death, the deceased called upon Plaintiff at their daughter's home and asked her if she would "take him back," which she refused to do.

IV.

The rejection of the claim of the Plaintiff by the Deputy Commissioner is not in accordance with law and is erroneous for the reason that the wrong-doing of the Plaintiff after she commenced to live apart from the deceased for justifiable cause did not deprive her of the right to the death benefit as his surviving wife and widow under the statute here in question.

Wherefore, Plaintiff prays:

- a. That this Court take jurisdiction of this suit.

b. That upon final hearing herein, it be decreed by this Court that the said order by the Deputy Commissioner rejecting Plaintiff's claim to the death benefit was not in accordance with law, and that the same be vacated, set aside and held to be of no force, virtue or effect.

c. That a mandatory injunction be issued by this Court to the Deputy Commissioner directing him to set aside said order rejecting Plaintiff's claim, and to enter a new order in accordance with the law, as applied to the facts in this case.

d. That the Plaintiff herein may have such other and further relief that she may be entitled to in equity and good conscience.

This 6th day of June 1952.

(S.) JULIA THOMPSON,
Plaintiff.

McCLURE & TURVILLE,
By (S.) J. A. McCLURE, JR.,
Attorneys for Plaintiff,
821 Florida National Bank Bldg.,
St. Petersburg, Florida.

State of Florida,
County of Pinellas.

Before me, the undersigned authority, this day personally appeared Julia Thompson, who, after being duly sworn according to law, says that the matters and things set forth in the foregoing Complaint are true.

(S.) JULIA THOMPSON.

Sworn to and subscribed before me this 6th day of June 1952.

(S.) OLGA S. GAZDIK,
Notary Public State of Florida
at large.

(Notarial Seal.)

My commission expires August 23, 1955. Bonded by Mass. Bonding & Insurance Co.

EXHIBIT A.

(Copy.)

U. S. Department of Labor
Bureau of Employees' Compensation
Sixth Compensation District

In the matter of the claims for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

Julia Thompson and Sallie Thompson claiming, respectively, as widow of deceased employee, Otis Thompson, Claimants,

vs.

Gulf Florida Terminal Company Incorporated Employer.

American Mutual Liability Insurance Company, Insurance Carrier.

Compensation Order Rejection of Claims Case No. 399-260-F.

Such investigations in respect to the above entitled claims having been made as is considered necessary and hearings having been duly held in conformity

with law, the Deputy Commissioner makes the following

Findings of Fact.

That on the 7th day of June 1951, the deceased herein, Otis Thompson, was in the employ of the employer herein, Gulf Florida Terminal Company Incorporated of 13th and York Streets, Tampa, Florida at Tampa in the State of Florida in the Sixth Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act and that the liability of the employer for the payment of compensation under said Act was insured by American Mutual Liability Insurance Company; that on said day, the deceased herein, while performing service for the employer as gang header and engaged in loading the S/S Mobilian which was afloat in Ybor Channel, sustained personal injury when, as he was in lower tween deck and guiding a sling load of dunnage into the tanks, he lost his balance and fell into the tanks causing injuries to his head with severe cerebral concussion, fracture of the sixth cervical vertebra and transection of the spinal cord which resulted in his death on June 15th, 1951; that the employer furnished the deceased with medical treatment, etc., in accordance with Section 7(a) of the said Act; that the average annual earnings of the deceased herein at the time of his injury amounted to the sum of \$2,687.96; that the funeral expenses were \$603.25 and were paid by Lucille Thompson; that the insurance carrier has reimbursed Lucille Thompson in the sum of \$400.00 for such expenses; that the claimant Julia Thompson and the deceased herein Otis Thompson were married on

January 15th, 1921; that Julia Thompson and Otis Thompson thereafter had two children, William Gordon Thompson and Lucille Thompson, and lived together as man and wife in the Beauchamp-Hammack Community near Coleman, Randolph County, Georgia until approximately the first Monday in November 1925 when Otis Thompson deserted Julia Thompson; that Otis Thompson and Julia Thompson never lived together as man and wife thereafter; that Otis Thompson never contributed to the support of Julia Thompson or their children after that day; that Julia Thompson never applied to any Court for relief or support for herself and her children nor attempted in any way to compel Otis Thompson to support her or their children; that when Otis Thompson deserted Julia Thompson he moved to Tampa, Florida, where he made his home and he remained a resident of Tampa until his death on June 15th, 1951; that Julia Thompson continued to live at or near Coleman, Georgia until about 1936; that about 1936 Julia Thompson and Alice Thompson, mother of Otis, went by automobile from Coleman to Tampa where Alice Thompson remained to visit with her son Otis Thompson; that Otis Thompson, at the time his mother arrived at Tampa, went to the automobile and gave directions to Julia Thompson regarding the route from Tampa to Homestead, Florida, where Julia Thompson and the children were going to visit her mother; that Julia Thompson did not thereafter return to Coleman; that Otis Thompson and Julia Thompson were never divorced; that on June 28th, 1940 Julia Thompson was married to Jimmy Lewis Fuller at Miami, Florida, and ever since then she has been known as Julia Fuller; that Jimmy Lewis Fuller divorced Julia Fuller (Thompson) in August, 1949 in Ohio, charging

desertion; that Julia Thompson moved to St. Petersburg, Florida in 1941 and has lived there ever since under the name of Julia Fuller; that Julia Fuller (Thompson) started to work for a bank in St. Petersburg in 1943 and is still working for the same employer; that Otis Thompson knew that Julia Thompson had been married and went by the name of Fuller; that the claimant, Julia Thompson, was born March 18, 1908; that prior to his desertion of Julia Thompson, Otis Thompson had been unfaithful to Julia Thompson and had been "running around" with, and had been intimate with a neighbor named Sallie Williams; that it was a matter of common knowledge in the community that Otis Thompson and Julia Thompson were man and wife; that Sallie Williams, while she was living near Coleman, knew that Otis Thompson and Julia Thompson were reputed to be man and wife; that about August, 1926, Otis Thompson went to Coleman from Tampa, but did not visit Julia Thompson, and left again in a day or two, returning to Tampa and taking Sallie Williams with him; that Otis Thompson and Sallie Williams then began living together and on August 17th, 1929 they were married at Tampa; that at the time of making application for the license for this marriage, Otis Thompson stated that he had been divorced; that this was a false statement in that Otis Thompson and Julia Thompson had never been divorced; that Sallie Williams knew that Otis Thompson and Julia Thompson had not been divorced; that in 1949 Sallie Thompson went to Newark, New Jersey to visit a relative and while there secured a job; that since that time she has continued to work and to reside in Newark, New Jersey and was residing there at the time of Otis Thompson's injury and death; that during the

period from 1949 until the death of Otis Thompson on June 15th, 1951, Sallie Thompson returned to Tampa on two or three occasions, stayed at Tampa approximately one month and returned to Newark; that the claimant, Sallie Thompson, was born April 25th, 1905; that during Sallie Thompson's absence from Tampa, and at a time approximately three weeks before his injury on June 7th, 1951, Otis Thompson called upon Julia Thompson at the home of their daughter Lucille; that during the time of that visit Otis Thompson asked Julia Thompson if she would "take him back" and Julia Thompson refused; that Julia Thompson did not have any intentions of ever again living with Otis Thompson and resuming the relationship of husband and wife; that at the time of his injury and death the claimant, Julia Thompson, was the lawful wife of Otis Thompson; that from November 1925 until June 1940 the claimant, Julia Thompson, was living apart from Otis Thompson by reason of his desertion; that Julia Thompson was not living apart from Otis Thompson at the time of his death for justifiable cause or by reason of his desertion; that at the time of his injury or death Julia Thompson was not dependent for support upon Otis Thompson; that the claimant, Julia Thompson, is not entitled to receive compensation for the death of Otis Thompson; that the marriage of Otis Thompson and Sallie Williams on August 17th, 1929 was illegal and void ab initio; that the claimant, Sallie Thompson, was not the lawful wife of the deceased herein, Otis Thompson; that the claimant, Sallie Thompson, is not entitled to receive compensation for the death of Otis Thompson; that the fee of McClure & Turville, attorneys for Julia Thompson for services rendered in this case is approved in the sum of \$400.00; that the

fee of Paul Lake, attorney for Sallie Thompson for services rendered in this case is approved in the sum of \$300.00.

Upon the foregoing facts it is ordered by the Deputy Commissioner that the claim for compensation filed by Julia Thompson be and it is hereby rejected for the following reasons:

1. That she was not living with or dependent for support upon Otis Thompson at the time of his death.
2. That she was not living apart from Otis Thompson for justifiable cause or by reason of his desertion at the time of his death.

Upon the foregoing facts it is ordered by the Deputy Commissioner that the claim for compensation filed by Sallie Thompson be and it is hereby rejected for the following reason:

1. That she is not the surviving wife of the deceased, Otis Thompson.

Given under my hand at Jacksonville, Florida,
this 23rd day of May 1952.

(S.) RICHARD P. LAWSON,
Deputy Commissioner.

Proof of Service.

I hereby certify that a copy of the foregoing Compensation Order was sent by registered mail to the

claimants, employer and the insurance carrier at the last known address of each as follows:

Name—Address

Julia Thompson, 1423—3rd Avenue, South St. Petersburg, Florida.

Sally Thompson, 75 South Orange Avenue, Newark, New Jersey.

Gulf Florida Terminal Co., Inc., 13th & York Streets Tampa, Florida.

American Mutual Liability Insurance Co., 367 North Orange Avenue, Orlando, Florida.

(S.) RICHARD P. LAWSON,
Deputy Commissioner.

Mailed: May 23rd, 1952.

CC:

U. S. Department of Labor
Bureau of Employees' Compensation
4th Street & Independence Avenue, S.W.
Washington 25, D. C.

Mr. J. Herndon Hansbrough, Attorney
C/O MacFarlane, Ferguson Allison & Kelly
1st National Bank Bldg.,
Tampa, Florida

McClure & Turville, Attorneys
817 Florida Nat'l Bank Bldg.,
St. Petersburg, Florida

Paul Lake, Attorney
Stovall Professional Building
Tampa, Florida

On July 10th, 1952 the Defendant, Gulf Florida Terminal Company, Incorporated, filed its MOTION TO DISMISS in the following words and figures to wit:

(Title Omitted.)

Certificate of Service.

I do hereby certify that copy hereof has been furnished to McClure and Turville, attorneys for Plaintiff, 821 Florida National Bank Building, St. Petersburg, Florida, by mail this 9th day of July, 1952.

(S.) ARTHUR A. SIMPSON,
(Arthur A. Simpson),
Of MacFarlane, Ferguson,
Allison & Kelly, P. O. Box
1531, Tampa, Florida,
Attorneys for Defendant.

Motion to Dismiss.

Comes now the Defendant, Gulf Florida Terminal Company, Incorporated, by its undersigned attorneys, and moves the Court to dismiss the Complaint filed herein for that:

1. Complaint fails to state a claim upon which relief can be granted.
2. It affirmatively appears from the findings of fact shown in the Compensation Order attached as

"Exhibit A" to the Complaint that the order rejecting the claim of Julia Thompson for compensation was correct as a matter of law.

(S.) ARTHUR A. SIMPSON,
(Arthur A. Simpson),
Of Macfarlane, Ferguson,
Allison & Kelly, P. O. Box
1531, Tampa, Florida,
Attorneys for Defendant.

On August 20th, 1952 the Defendant, Richard P. Lawson, filed his MOTION TO DISMISS in the following words and figures to wit:

(Title Omitted.)

Motion to Dismiss Bill of Complaint.

Comes now the defendant, Richard P. Lawson, as Deputy Commissioner of the United States Bureau of Employees' Compensation, Sixth Compensation District, by the undersigned Assistant United States Attorney, and moves this Honorable Court to dismiss the plaintiff's bill of complaint filed herein, upon the following grounds:

1. Plaintiff has failed to provide sufficient record for review by this Court.
2. Plaintiff's bill of complaint fails to state a cause of action.

3. Plaintiff seeks a trial de novo before this Court contrary to statutes and regulations permitting review of defendant's orders.

(S.) J. HARDIN PETERSON, JR.,
(J. Hardin Peterson, Jr.),
Assistant United States Attorney.

On December 31st, 1952 the Court filed its ORDER in the following words and figures to wit:

(Title Omitted.)

Order Dismissing Bill of Complaint.

This cause coming on to be heard December 23, 1952, upon Plaintiff's Bill of Complaint for Mandatory Injunction to set aside the order rejecting claim for death benefit, Motions to Dismiss the same filed herein by Sallie Thompson, Gulf Florida Terminal Company, Incorporated, and American Mutual Liability Insurance Company upon the grounds that Complainant fails to state a claim upon which relief can be granted and it affirmatively appears from the findings of fact shown in the compensation order attached as Exhibit A to the Complaint that the order rejecting the claim of Julia Thompson for compensation was correct as a matter of law, and the Motion to Dismiss filed herein by Richard P. Lawson, as Deputy Commissioner of the United States Bureau of Employees Compensation, upon the grounds that Plaintiff's Bill of Complaint fails to state a cause of action, seeks a

trial de novo and fails to provide sufficient record for review by this Court, and all parties defendant being represented by counsel and before the Court and after argument before the Court,

It Is Thereupon Ordered, Adjudged and Decreed that the Motion to Dismiss filed herein by the Defendant, Richard P. Lawson upon the grounds that Plaintiff has failed to provide sufficient record for review by this Court and seeks a trial de novo be, and the same is hereby, denied.

It Is Further Ordered, Adjudged and Decreed that the Motions to Dismiss filed herein by each of the Defendants upon the grounds that the complainant fails to state a claim upon which relief can be granted and it affirmatively appears from the findings of fact shown in the compensation order attached as Exhibit A to the Complaint that the order rejecting the claim of Julia Thompson for compensation was correct as a matter of law be, and the same are hereby, granted under authority of Ryan Stevedoring Co., Inc., et al., vs. Henderson, et al., 138 Fed. 2d. 348, and American Mutual Liability Insurance Company, et al., vs. Henderson, et al. 141 Fed. 2d. 813.

This 31 day of December 1952.

(S.) GEORGE W. WHITEHURST.

On January 27, 1953 Plaintiff filed her NOTICE OF APPEAL in the following words and figures to wit:

(Title Omitted.)

Notice of Appeal.

Notice is hereby given that Julia Thompson, Plaintiff in the above-entitled cause, appeals to the United States Court of Appeals for the Fifth Circuit from the Order Dismissing Bill of Complaint entered herein on the 31st day of December 1952, in favor of the Defendants, and against the Plaintiff.

This 26th day of January 1953.

McCLURE & TURVILLE,
By (S.) J. A. McCLURE, JR.,
Attorneys for Appellant.

821 Florida National Bank Building,
St. Petersburg, Florida.

I do hereby certify that copies hereof have been furnished by mail this 26th day of January 1953 to Macfarlane, Ferguson, Allison & Kelly, attorneys for Gulf Florida Terminal Co., Inc., and American Mutual Liability Insurance Company, P. O. Box 1531, Tampa, Florida; Paul Lake, attorney for Sallie Thompson, Stovall Professional Building, Tampa, Florida, and United States Attorney, Post Office Box 2344, Tampa 1, Florida, attorney for Richard P. Lawson, Deputy Commissioner.

(S.) J. A. McCLURE, JR.,

On January 27th, 1953 Plaintiff filed her STATEMENT OF POINTS in the following words and figures to wit:

(Title Omitted.)

Statement of Points.

The statement of points to be relied upon by appellant, plaintiff below, is as follows:

1. The Court erred in granting Motions to Dismiss by entering Order Dismissing Bill of Complaint.

McCLURE & TURVILLE,
By (S.) J. A. McCLURE, JR.,
Attorneys for Appellant.

821 Florida National Bank Building,
St. Petersburg, Florida.

I do hereby certify that copies hereof have been furnished by mail this 26th day of January 1953 to Macfarlane, Ferguson, Allison & Kelly, attorneys for Gulf Florida Terminal Co., Inc., Mutual Liability Insurance Company, P. O. Box 1531, Tampa, Florida; Paul Lake, attorney for Sallie Thompson, Stoval Professional Building, Tampa, Florida, and United States Attorney, attorney for Richard P. Lawson, as Deputy Commissioner of the United States Bureau of Employees' Compensation, Sixth Compensation District, Post Office Box 2344, Tampa 1, Florida.

(S.) J. A. McCLURE, JR.,
Of Counsel.

On January 27th, 1953 Plaintiff filed her DESIGNATION OF CONTENTS OF RECORD in the following words and figures to wit:

(Title Omitted.)

Designation of Contents of Record.

Pursuant to Rule 75 (a) of the Federal Rule of Civil Procedure, Plaintiff-Appellant herewith designates for inclusion in the record on appeal to the United States Court of Appeals for the Fifth Circuit the following portions of the record and proceedings in this action:

1. The Complaint, together with Exhibit A attached thereto.
2. Motions to Dismiss filed by the Defendant, Gulf Florida Terminal Company, Incorporated, and Defendant, Richard P. Lawson.
3. Order Dismissing Bill of Complaint.
4. Notice of Appeal.
5. Statement of Points.
6. This Designation.

McCLURE & TURVILLE,
By (S.) J. A. McCLURE, JR.,
Attorneys for Plaintiff-Appellant.

821 Florida National Bank Bldg.,
St. Petersburg, Florida.

I do hereby certify that copies hereof have been furnished by mail this 26th day of January 1953 to Macfarlane, Ferguson, Allison & Kelly, attorneys for Gulf Florida Terminal Co., Inc., and American Mutual Liability Insurance Company, P. O. Box 1531, Tampa, Florida; Paul Lake, attorney for Sallie Thompspon, Stovall Professional Building, Tampa, Florida, and United States Attorney, attorney for Richard P. Lawson, as Deputy Commissioner, Post Office Box 2344, Tampa 1, Florida.

(S.) J. A. McCLURE, JR.,
Of Counsel.

CLERK'S CERTIFICATE

United States of America,
Southern District of Florida.

I, JULIAN A. BLAKE, Clerk of the United States District Court for the Southern District of Florida, and as such the legal custodian of the records and files of said Court, do hereby certify that the foregoing typewritten pages, numbered from 1 to 16, inclusive, contain a full, true and correct copy of Transcript of Record in a certain cause lately pending in said Court in the matter of Julia Thompson as the Plaintiff, and Richard P. Lawson, as Deputy Commissioner of the United States Bureau of Employees' Compensation, Sixth Compensation District, et al., are Defendants, prepared in accordance with and requested by directions to the Clerk, as same appears among the files and records of this Court.

In Witness Whereof, I hereunto set my hand and affix the official seal of this Court, this the 23rd day of February, A. D. 1953.

JULIAN A. BLAKE,
Clerk, United States District
Court, Southern District of
Florida

By LEONA JONAS,
Deputy Clerk.

[fol. 22] IN THE UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 14,484

JULIA THOMPSON

versus

RICHARD P. LAWSON, AS DEPUTY COMMISSIONER OF THE UNITED
States Bureau of Employees' Compensation, Sixth Com-
pensation District, Et Al.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION, dated June
3rd, 1953; omitted in printing

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 14484

JULIA THOMPSON,

Appellant,

versus

RICHARD P. LAWSON, AS DEPUTY COMMISSIONER
OF THE UNITED STATES BUREAU OF EM-
PLOYEES' COMPENSATION, SIXTH COMPENSA-
TION DISTRICT, ET AL.,

Appellees.

*Appeal from the United States District Court for the
Southern District of Florida.*

(June 30, 1953.)

Before HUTCHESON, Chief Judge, and RUSSELL and
STRUML, Circuit Judges.

HUTCHESON, Chief Judge: This appeal presents
the single question whether, on the facts¹ found by the

¹ These as material here are: that the claimant Julia Thompson and the deceased were married on Jan. 15, 1921; that Julia Thompson and Otis Thompson thereafter had two children, William Gordon Thompson and Lucille Thompson, and lived together as man and wife until approximately the first Monday in November, 1925, when Otis Thompson deserted Julia Thompson; that Otis Thompson and Julia Thompson never lived together as man and wife thereafter; that Otis Thompson never contributed to the support of Julia Thompson or their children after that date; that Otis Thompson and Julia Thompson were never divorced; that on June 28, 1940, Julia Thompson was

Deputy Commissioner, Commissioner and Judge were right in rejecting plaintiff's claim that, within the meaning of Section 902(16),² Title 33 U.S.C., she was the "widow" of Otis Thompson, deceased, and entitled to recover compensation as such.

Here, appealing from the judgment approving the finding of the commissioner and dismissing her claim, plaintiff, admitting that the cases³ in this court, cited by the district judge in support of his judgment, do support it, assails those cases as wrongly decided.

married to Jimmy Lewis Fuller at Miami, Florida; and ever since then she has been known as Julia Fuller; that Jimmy Lewis Fuller divorced Julia Fuller (Thompson) in August, 1949, in Ohio, charging desertion; that Julia Thompson moved to St. Petersburg, Florida in 1941 and has lived there ever since under the name of Julia Fuller; that about Aug., 1926, Otis Thompson and Sallie Williams began living together and on Aug. 17, 1929, they were married at Tampa; that at the time of making application for the license for this marriage, Otis Thompson stated that he had been divorced; that this was a false statement in that Otis Thompson and Julia Thompson had never been divorced; and that Sallie Williams knew that they had not, and the purported marriage was illegal and void; that in 1949 Sallie Thompson went to Newark, New Jersey to visit a relative and while there secured a job; that since that time she has continued to work and to reside in Newark, New Jersey and was residing there at the time of Otis Thompson's injury and death; that during the period from 1949 until the death of Otis Thompson on June 15, 1951, Sallie Thompson returned to Tampa on two or three occasions, stayed at Tampa approximately one month and returned to Newark; that during Sallie Thompson's absence from Tampa, and at a time approximately three weeks before his injury on June 7, 1951, Otis Thompson called upon Julia Thompson at the home of their daughter Lucille; that during the time of that visit Otis Thompson asked Julia Thompson if she would "take him back" and Julia Thompson refused; that Julia Thompson did not have any intentions of ever again living with Otis Thompson and resuming the relationship of husband and wife; on the basis of these facts the commissioner found: (1) that at the time of his injury and death the claimant, Julia Thompson was the lawful wife of Otis Thompson; (2) that from Nov., 1925, until June, 1940, she was living apart from him by reason of his desertion; (3) that she was not living apart from him at the time of his death for justifiable cause or by reason of his desertion; (4) that at the time of his death she was not dependent for support upon him; and (5) that she was not entitled to receive compensation for his death.

² "The term 'widow' includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time."

³ *Ryan v. Henderson*, 138 F(2) 348; *American v. Henderson*, 141 F(2) 813.

Citing as in conflict therewith two earlier decided cases, one from the Third⁴ and the other from the Second Circuit,⁵ and a later one from the Ninth Circuit,⁶ she insists that we should re-examine our decisions and, on the authority of the cited cases, disapprove and overrule them.

We cannot agree. We find nothing in the reasoning of the cited cases to recommend them to our approval. On the contrary, we think they proceed upon a completely false premise. This is that the rejection of the wife's claim is based upon the view that, at the time of the death of the husband, the wife was living an immoral life and must be punished therefor. While this fact points up the anomaly of her claim in instances where the new relation is knowingly meretricious, this is not at all the basic reason for its rejection. The reason is to be found in the precise terms of the statute which requires for recovery that "at the time of his death", the woman claiming as "widow" must either be *living with* or dependent for support upon her husband, or, if *she is living apart from him* that she is doing so *for justifiable cause or by reason of his desertion at that time*.

Our decisions therefore proceed upon the conclusion that living in the relation of wife to another man and having and raising children by and for him at the time of her husband's death cannot be said to be justifiable cause for the wife's not living with him. Neither, if causation is to mean anything, can it be said that a woman is, at the time of her husband's death, living

⁴ Travelers Ins. Co. v. Norton, 34 Fed. Supp. 740.

⁵ Associated Operating Co. v. Lowe, 52 Fed. Supp. 550; Affirmed Per Curiam, 138 F(2) 916.

⁶ Moore Dry Dock Co. v. Pittsburgh, 169 F(2) 988.

apart from him because of his desertion, when though originally deserted by her husband without fault on her part, she has made a new life for herself by living with another man as his wife.

The fact made so much of in the *Moore Dry Dock* case, *supra*, that the deserted wife, in the good faith belief that her first marriage had ended in divorce, had entered into a new ceremonial marriage, while relevant on the question of her moral blameworthiness, would not show or tend to show that she was the statutory widow of the deceased. On the contrary, by showing that she had set up a new marital establishment on a permanent basis which the death of her first husband had legalized, it would show even more clearly than a meretricious relation would that she was not the widow of the deceased but another man's wife.

We are in no doubt that our cases were correctly decided and should not be departed from. But if we are incorrect in the view that they were well decided on their facts, the judgment should still be affirmed, since it is undisputed and found that three weeks before his death the deceased had endeavored to have the plaintiff return to him and she had refused to do so.

The judgment was right. It is AFFIRMED.

A True copy:

Teste:

.....
Clerk of the United States Court of
Appeals for the Fifth Circuit.

[fol. 27] IN THE UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 14,484

JULIA THOMPSON

versus

RICHARD P. LAWSON, AS DEPUTY COMMISSIONER OF THE UNITED
State Bureau of Employees' Compensation, Sixth Com-
pensation District, Et Al.

JUDGMENT—June 30th, 1953

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Julia Thompson, be condemned, to pay the cost of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 28] IN THE UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 14,484

[Title omitted]

DESIGNATION OF RECORD—Filed September 10th, 1953

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the

United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint appendix.
2. Opinion of the Court of Appeals.
3. Judgment of the Court of Appeals.
4. Designation of record.
5. Clerk's certificate.

(S). J. A. McClure, Jr., McClure and Turville,
Counsel for Petitioner.

[fol. 29] Clerk's Certificate to foregoing transcript omitted
in printing.

[fol. 30] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1953

No. 352

JULIA THOMPSON, Petitioner,

vs.

RICHARD P. LAWSON, as Deputy Commissioner of the United
States Bureau of Employees Compensation, etc., et al.

ORDER ALLOWING CERTIORARI—Filed November 16, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1830)

FILED

SEP 16 1953

HAROLD B. WILLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 352

JULIA THOMPSON,

Petitioner,

vs.

RICHARD P. LAWSON, AS DEPUTY COMMISSIONER OF THE
UNITED STATES BUREAU OF EMPLOYEES COMPENSATION,
SIXTH COMPENSATION DISTRICT, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No.

JULIA THOMPSON,

Petitioner,

vs.

RICHARD P. LAWSON, AS DEPUTY COMMISSIONER OF THE
UNITED STATES BUREAU OF EMPLOYEES COMPENSATION,
SIXTH COMPENSATION DISTRICT, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT.

The petitioner, Julia Thompson, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit (R. 26) affirming a judgment of the United States District Court in and for the Southern District of Florida dismissing the bill of complaint herein (R. 15).

Opinions Below

The opinion of the Court of Appeals is unreported and is set forth at page 22 of the Record herein. The District Court filed no opinion.

Jurisdiction

The judgment of the Court of Appeals was entered on June 30, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Question Presented

Does the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 901, 33 Stat. 901) bar recovery of death benefits by a deserted widow of an employee covered by the Act, if after desertion without fault on her part, the widow entered into a bigamous marital relation which had been terminated before the death of the employee, and if the widow responded negatively to her husband's query, twenty-five years after the desertion, would she "take him back"?

Statute Involved

The statute involved is Section 902(16), Title 33, United States Code, which defines "widow" as follows:

"The term 'widow' includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time."

Statement

Otis Thompson, a gang header on a vessel at Tampa, Florida, died as a result of injuries sustained through his employment on June 15, 1951. His employment was covered by the Longshoremen's and Harbor Workers' Compensation Act (R. 7).

Thompson had married Julia Thompson on January 15, 1921. Two children were born, and Otis and Julia Thompson lived together until 1925. In that year, Otis Thompson began an adulterous relationship with Sallie Williams, and in November, he deserted his wife, the present petitioner. Thereafter, Otis Thompson never lived with his wife and

contributed nothing to her support or for that of their children. Their marriage, however, was never terminated by divorce (R. 8).

In 1926, Otis Thompson began to live with Sallie Williams as man and wife. In 1929, he celebrated the relationship with a marriage ceremony. In 1949, Sallie Williams left Otis Thompson, except for several return visits of short duration (R. 9, 10).

Julia Thompson, for her part, went through a marriage ceremony with Jimmy Lewis Fuller in 1940. Her bigamous marital relation continued until 1949, when Fuller obtained a divorce upon grounds of desertion (R. 8, 9).

Three weeks before Otis Thompson received his fatal injuries, he visited Julia Thompson and asked if she would "take him back". She refused (R. 10).

After the death of Otis Thompson, petitioner filed a claim with the Bureau of Employees' Compensation of the United States Department of Labor for the death benefit due the widow of a deceased employee covered by the Longshoremen's and Harbor Workers' Compensation Act. After entering findings of fact, which are substantially set forth above, the respondent, as Deputy Commissioner of the Bureau, rejected the petitioner's claim for the reason, pertinent here, "That she was not living apart from Otis Thompson for justifiable cause or by reason of his desertion at the time of his death".

Petitioner then filed her Complaint in the United States District Court for the Southern District of Florida for a mandatory injunction to set aside the order rejecting the claim for death benefit. The respondents filed a motion to dismiss upon the grounds that the plaintiff below failed to state a claim upon which relief could be granted, and that it affirmatively appeared from the findings of fact in the compensation order that the order rejecting the claim of Julia Thompson for compensation was correct as a matter

of law. The court below granted the motion to dismiss (R. 1, 13, 15-16).

An appeal was taken from the Order Dismissing the Bill of Complaint to the Court of Appeals for the Fifth Circuit. The Court of Appeals affirmed the judgment, although in its opinion it conceded that the Second, Third and Ninth Circuits have each reached an opposite rule of law, albeit upon "a completely false premise" (R. 17, 22, 24).

Reasons for Granting Writ of Certiorari

(1) The decision below and the rule adopted by the Fifth Circuit is a minority rule which is in conflict with the decisions of the Second Circuit, (See *Associated Operating Company v. Lowe*, 52 F. Supp. 550, affirmed, 138 F. 2d 916); the Third Circuit (See *Travelers Insurance Co. v. Norton*, 34 F. Supp. 740) and the Ninth Circuit (See *Moore Dry Dock Co. v. Pillsbury*, 169 F. 2d 988). In each of the cited cases, the facts are substantially identical with those present in the action below: an adulterous cohabitation by the wife after she began to live apart from her husband for justifiable cause or by reason of his desertion.

It is a manifest injustice and an absurdity in the administration of a federal statute designed to protect similarly situated persons in a common occupation throughout the country, to permit a widow to recover benefits if her deceased husband has worked in New York, Connecticut, Pennsylvania, New Jersey, Delaware, or the Pacific coast, but to deny her the benefits if his employment was in the Gulf states.

(2) A resolution of the conflict by this Court is required not only to obtain uniformity in the interpretation of the Longshoremen's and Harbor Workers' Compensation Act, which affects approximately 65,000 longshoremen and harbor workers (U. S. Census, 1950), and, by reason of the Defense Bases Act, (55 Stat. 622, 42 U. S. C. 1651) all per-

sons employed outside of the continental United States on defense or public works projects, but is required for the administration of two additional compensation statutes:

(a) The United States Employees' Compensation Act (5 U. S. C. 760 (H)) defines widow in almost identical language:

"The term 'widow' includes only the decedent's wife living with or dependent for support upon him at the time of his death or living apart for reasonable cause or by reason of his desertion."

Although the qualification of a widow for benefits under that statute has not been tested in the courts, it has been subject to controverted holdings by the Employees' Compensation Appeals Board of the United States Department of Labor. (See *In the Matter of Rose Munoz v. War Shipping Administration*, Docket 48-114, decided August 8, 1949; *In the Matter of Rosa Pierson Estes v. Works Progress Administration*, Docket No. 50-38, decided July 20, 1951; and *In the Matter of Lucille Daniels v. Department of the Army*, Docket No. 52-168, decided August 21, 1953).

(b) The District of Columbia Workmen's Compensation Act, (36 D. C. Code 501, 45 Stat. 600) applies the provisions of the Longshoremen's Act to the payment of workmen's compensation in the District of Columbia.

A clarification of the statutory language in the Longshoremen's and Harbor Workers Compensation Act will at once resolve the conflict between the various Circuits of the United States Court of Appeals, and provide a guide to the Bureau of Employees Compensation Appeals in administering three acts which cover over two and one-half million workers in all. (See monthly Report of Employment, Executive Branch of Federal Government, June, 1953, U. S. Civil Service Commission; Statistical Abstract of the United States Department of Commerce, 1950.)

3. The decision below was erroneous. It was based upon a judicial interpolation in the Act rather than the unambiguous provisions of the Act itself. For the Courts below read into the Act a provision for inquiry into the wife's subsequent life and conduct after marital infidelity and abandonment by her husband. See *Associated Operating Co. v. Lowe*, op. cit. at p. 552. Such a provision should not be read into the Act by judicial construction, *Moore Dry Dock v. Pillsbury*, op. cit., at p. 991 and indeed, exceeds the proper bounds of the judicial function, *Travelers Insurance Co. v. Norton*, op. cit. at p. 842.

Moreover, the alternative ground for affirming the appeal by the Court of Appeals below is equally erroneous. The Appellate Court stated, in an apparent afterthought and without citation of authority, that assuming its construction of the Longshoremen's and Harbor Workers' Act to be incorrect, "the judgment should still be affirmed, since it is undisputed and found that three weeks before his death the deceased had endeavored to have the plaintiff return to him and she had refused to do so."

On the facts, the statement of the Appellate Court would appear to be exaggerated. For the findings were not that the decedent "endeavored to have the plaintiff return", but merely that 25 years after his desertion, he inquired whether she would "take him back." Obviously, a single query in the subjunctive and in the context of the long desertion and a prolonged marital infidelity cannot be said to be an "endeavor".

Endeavor or not, the Appellate Court is misstating the law as to desertion.

The law of divorce, in the Florida courts, insofar as it is based upon desertion, is incontrovertibly against the posi-

tion taken by the Court of Appeals. In *Wright v. Wright*, 87 So. 156 (1921) the Supreme Court of Florida held:

"Whatever may be the duty of either spouse during the period when the cause of action on the ground of desertion is incubating, there is no obligation upon the part of either, after the desertion has been wilful, obstinate, and continued for the period of a year, to resume the marital relations."

In that action an offer of reconciliation came twenty months after the desertion and eight months after the cause of action accrued. The Court said:

". . . (the offer) came too late, as the desertion had been obstinate, wilful, and continued for a year, and after such a desertion the injured party is within his rights if he declines to resume marital relations."

In view of the Florida law, to which the Court of Appeals must adhere, it cannot bar the appellant her right to widow's benefits under the Act because she exercised her lawful right to refuse an offer of reconciliation which came twenty-five years after her husband deserted her. Moreover, the Court below ignored the statutory provision relating to "justifiable cause". On the record, petitioner established such cause by the finding as to her husband's initial infidelity.

Conclusion

Inasmuch as the rulings of the Fifth Circuit are in conflict with the prevailing rule of the Second, Third and Ninth Circuits, and the Act in question is a federal statute which for the proper administration of justice requires a uniformity in interpretation, and the decision below is erroneous,

ous on the merits, petitioner respectfully requests that certiorari be granted.

Respectfully submitted,

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Of Counsel.

MORNING EDITION

**THE SPY WHO LOVED ME
MURKIN'S BURNING
TRANSMISSION SIXTH COM**

DO YOU KNOW A PUNK?

WEDDING ALBUM FOR

**Dawn Casper
Travis M. Casper
Vince A. Mazzola**

D.C.

THE

**The
Of Class**

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 352

JULIA THOMPSON,

vs.

Petitioner,

RICHARD P. LAWSON, AS DEPUTY COMMISSIONER
OF THE UNITED STATES BUREAU OF EMPLOY-
EES' COMPENSATION, SIXTH COMPENSATION
DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

The respondents, Gulf Florida Terminal Company, Incorporated and American Mutual Liability Insurance Company, in their brief in opposition to the petition for writ of certiorari have sought to frame the question for this Court as though the issue presented here were one of sufficiency of evidence upon which to base findings by an administrative agency, rather than one of law.

The respondents can find no support for their position either in the decision below or in the other decisions on the

problem posed by the present petition. The Fifth Circuit in its opinion below stated that:

"This appeal presents the single question whether on the facts found by the Deputy Commissioner, Commissioner and Judge were right in rejecting plaintiffs' claim that within the meaning of (the Act), she was the "widow" of Otis Thompson, deceased, and entitled to recover compensation as such."

The question was resolved by the Court not by a ruling that the Deputy Commissioner's findings were based upon sufficient evidence, but upon the prior holdings of the Fifth Circuit. They proceed, the Court declared, upon the *conclusion* (R. 25) that a wife who has lived with another man, after her husband's desertion, cannot be said to be living apart from her husband for justifiable cause or by reason of his desertion at the time of his death.

An analysis of the two prior decisions of the Fifth Circuit Court of Appeals cited by the Court below indicates that in each case the issue of the wife's behavior, after separation, was treated as one of law.

In *American Mutual Liability Insurance Co. v. Henderson*, 141 F. 2d 813, the Deputy Commissioner had made an award to a wife, who after desertion by her husband, lived with and bore children of another man. The Fifth Circuit reversed the award without regard to the findings of the Deputy Commissioner and ruled:

"As this court held in the recent case of *Ryan Stevedoring Company v. Henderson*, 5 Cir. 138 F. 2d 348, this new and independent reason for her living apart from her husband operated as a matter of law to forfeit any and all rights of the wife as a claimant of compensation under the Act." (p. 814, italics added.)

In the cited case, on similar facts, and again without regard to the findings of fact, the Fifth Circuit reversed

a compensation order by the Deputy Commissioner because it "was not in accordance with law." (Page 349.)

In *Travelers Insurance Company v. Norton*, 34 F. Supp. 740, D. C. E. D. Pa. 1940, the findings of fact contained no reference to the post-separation conduct of the wife. The plaintiff, on the basis of a stipulation as to the facts, sought reversal of the Deputy Commissioner's award as contrary to law. What is relevant here is that the District Court denied the plaintiff relief not upon the issue of the sufficiency of the evidence, but because "to read such a provision (barring recovery by the wife) into an unambiguous statute would exceed the proper bounds of the judicial function". (Page 742.)

Similarly in *Associated Operating Company v. Lowe*, 52 F. Supp. 550, aff'd per curiam 138 F. 2d 916, C. A. 2, 1943, the plaintiff sought to reverse an award by the Deputy Commissioner as being an erroneous finding of law. The opinion of the Court, although it termed the findings in the award as findings of fact and upheld the award, rejected the plaintiff's position upon the basis of its interpretation of the statute; namely, "I can find no authority for adding to the Statute provisions which are not even by fair inference to be found in it." (Page 553.)

In *Moore Dry Dock v. Pillsbury*, 169 F. 2d 988, C. A. 9, 19—, the Court stated:

"The compensation order did not make or contain any finding. Findings made by the Deputy Commissioner preceded the compensation order. There was no finding that claimant was a legal dependent upon decedent on May 12, 1945. There was what purported to be a finding, but actually was a conclusion of law, that claimant was entitled to a death benefit. The conclusion was correct; for, as stated above, claimant was decedent's widow."

The Ninth Circuit, as have the other Courts which have been confronted with the issue, regarded the question as one of statutory construction, holding in reply to the appellant's contention that the award was not in accordance with law, that "The Act does not provide that an employee's widow who, while married to such employee, went through a marriage ceremony with another man . . . shall not be entitled to a death benefit. Such a provision should not be read into the Act by judicial construction (pp. 990-991).

In none of the decisions, therefore, does it appear that the issue before this Court has been regarded as a finding of fact reviewable only for the sufficiency of evidence behind it. In each of the cases, the Courts, whether granting an award to the wife or denying it, have done so upon their interpretation of the statute.

Having thus misconceived the issue, it is understandable that the respondents here have themselves confused appearance with reality in stating that there is no conflict among the circuits. The best authority on the question obviously is the courts. The Fifth Circuit stated of the decisions in the Second, Third and Ninth Circuits: "We think they proceed upon a completely false premise"; while the Ninth Circuit said of the decisions in the Fifth Circuit: "To the extent that these decisions support appellant's contention, we deem them erroneous and decline to follow them". A more explicit statement of disagreement among the judicial circuits, we suggest, cannot be uttered.

To support their position, respondents suggest that the Deputy Commissioner's conclusion that petitioner was not living apart from decedent for justifiable cause or by reason of his desertion was based on the fact that on June 7, 1951, some 25 years after the desertion, Otis Thompson asked Julia Thompson if she would take him back and Julia

Thompson refused. As the supplemental memorandum for the respondent Deputy Commissioner suggests (p. 3) there is nothing in the record whatever to indicate that the Deputy Commissioner based his denial of the petitioner's claim for benefits upon this refusal in 1951. Directly to the contrary, the record shows that the Deputy Commissioner in his findings adopted the date of the petitioner's bigamous marriage ceremony in 1940 as the terminal date of her separation from her husband for justifiable cause or by reason of his desertion (R. 8), rendering the 1951 occurrence immaterial as far as the findings are concerned.

The makeweight ground added by the lower court for affirming the judgment below, to-wit, the negative answer to decedent's inquiry in 1951, is equally a question of law. It poses in substance the identical issue as petitioner's bigamous marriage after the desertion. Respondents themselves suggest (Brief in Opposition, p. 8) that the question for determination is whether the intervening acts of the wife after her husband's desertion altered her status as a wife living apart for justifiable cause or by reason of desertion. Intervening acts might be a bigamous marriage or other acts of immorality or a refusal by the wife to return to her husband or a negative answer to a question whether she would return.

Whether legal effect can be given to any intervening act must necessarily pose a question of law. For the issue, in any case, is whether the Statute permits the Deputy Commissioner to inquire into the conduct of the wife when she is living apart by reason of desertion or for justifiable cause.

Applicability of the Local Law of Divorce

In the view that the petitioner takes of the case, it is immaterial whether the law of Florida, or of a particular state be applied to the issue of the wife's refusal to re-

spond affirmatively to the question "Would she take him (her husband) back". It is patent that under the law of no State would a wife who had been deserted for 25 years and whose husband, prior to the desertion had begun an adulterous relationship which continued until his death, would lose her status as one living apart for justifiable cause or by reason of desertion merely because of her refusal under those circumstances to respond affirmatively to such an inquiry by her husband.

Conclusion

The pivotal issue in this case remains the construction to be given to the Longshoremen's and Harbor Workers' Compensation Act. Whatever may be said about the decision below, it must be conceded that the ruling is in conflict with the decisions of three other judicial circuits. In view of the importance of the issue in the administration of the statute, petitioner suggests that the original decision of this Court in granting a writ of certiorari was correct.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

HAROLD B. WILLEY,

OCTOBER TERM, 1953

No. 352

JULIA THOMPSON,

Petitioner,

vs.

RICHARD P. LAWSON, AS DEPUTY COMMISSIONER OF THE
UNITED STATES BUREAU OF EMPLOYEES' COMPENSATION,
SIXTH COMPENSATION DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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POINT I

A Subsequent Bigamous Marital Relation by a Wife Living Apart From Her Husband for Justifiable Cause or by Reason of His Desertion Does Not Bar Her From Recovery of Death Benefits Under the Longshoremen's and Harbor Workers' Compensation Act

(A) The Court went beyond the express language of the Statute

(B) A Review of the legislative history of the Act together with a consideration of the statutes in pari materia indicate that the authority for the ruling below cannot be bottomed upon the "purpose and spirit of the Act"

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POINT II

The Court Below Was in Error in Rejecting an Award to the Petitioner Upon the Ground That the Decedent Had Endeavored to Have the Plaintiff Return to Him and She Refused to Do So

(A) The Court below went beyond the findings of the Deputy Commissioner in order to reach the conclusion that the decedent endeavored to have his wife return to him

(B) The Court of Appeals as a matter of law could give no weight to the husband's

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query to his wife, the wife's refusal to resume the marital relation, or the absence of an intent by the wife to live with her husband again	5, 9, 11
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 352

JULIA THOMPSON,

Petitioner,

vs.

RICHARD P. LAWSON, AS DEPUTY COMMISSIONER OF THE
UNITED STATES BUREAU OF EMPLOYEES' COMPENSATION,
SIXTH COMPENSATION DISTRICT, AND GULF FLORIDA
TERMINAL INC. AND AMERICAN MUTUAL LIA-
BILITY INSURANCE COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals is reported in 205
F. (2d) 527 and is set forth at page 23 of the Record. The
District Court filed no opinion.

Jurisdiction

The judgment of the Court of Appeals was entered on June 30, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). Certiorari was granted on January 4, 1954.

Questions Presented

1. Whether a bigamous marital relation by a wife while living apart from her husband by reason of his desertion bars her from recovery of death benefits provided by the Longshoremen's and Harbor Worker's Compensation Act.
2. Whether, in determining the eligibility of a wife for benefits under the Act, the Bureau of Employees' Compensation or the Court of Appeals could give weight to the wife's intention not to resume the relationship of husband and wife with the deceased employee, after the husband's desertion and in the context of his prolonged adulterous relationship which continued up to the time of his death.

Statute Involved

The Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. 902 (16) provides at Section 2 (16) that:

“The term ‘widow’ includes only the decedent’s wife living with or dependent for support upon him at time of his death; or living apart for justifiable cause or by reason of his desertion at such time.”

Statement

Otis Thompson, a gang header on a vessel at Tampa, Florida, died as a result of injuries sustained through his employment on June 15, 1951. His employment was covered by the Longshoremen's and Harbor Workers' Compensation Act (R. 7).

Thompson had married Julia Thompson on January 15,

1921. Two children were born, and Otis and Julia Thompson lived together until 1925. In that year, Otis Thompson began an adulterous relationship with Sallie Williams. In November, he deserted his wife, the present petitioner. Thereafter, Otis Thompson never lived with his wife and contributed nothing to her support or for that of their children. Their marriage, however, was never terminated by divorce (R. 8).

In 1926, Otis Thompson began to live with Sallie Williams as man and wife. In 1929, he celebrated the relationship with a marriage ceremony. In 1949, Sallie Williams left Otis Thompson, but she continued to visit with him up to the date of his death (R. 9, 10).

Julia Thompson, for her part, went through a marriage ceremony with Jimmy Lewis Fuller in 1940. Her bigamous marital relation continued until 1949, when Fuller obtained a divorce upon grounds of desertion (R. 8, 9).

Three weeks before Otis Thompson received his fatal injuries, he visited Julia Thompson and asked if she would "take him back". She refused (R. 10).

After the death of Otis Thompson, petitioner filed a claim with the Bureau of Employees' Compensation of the United States Department of Labor for the death benefit due the widow of a deceased employee covered by the Longshoremen's and Harbor Workers' Compensation Act.

The respondent Deputy Commissioner of the Bureau, upon the basis of the facts recited above, entered as additional findings of fact that the petitioner did not have any intention resuming the relationship of husband and wife with the decedent; that at the time of his injury and death, the petitioner was the lawful wife of Otis Thompson; that from November, 1925 until June, 1940, the petitioner was living apart from her husband by reason of his desertion; that she was not living apart from him at the time of his death for justifiable cause or by reason of his desertion;

that she was not dependent upon her husband for support; and that she is not entitled to receive compensation for her husband's death (R. 10).

Upon the foregoing findings, the respondent, Deputy Commissioner, rejected the petitioner's claim for the reason, pertinent here, "That she was not living apart from Otis Thompson for justifiable cause or by reason of his desertion at the time of his death" (R. 11).

Petitioner then filed her Complaint in the United States District Court for the Southern District of Florida for a mandatory injunction to set aside the order rejecting the claim for death benefit. The respondents filed a motion to dismiss upon the grounds that the plaintiff below failed to state a claim upon which relief could be granted, and that it affirmatively appeared from the findings of fact in the compensation order that the order rejecting the claim of Julia Thompson for compensation was correct as a matter of law. The court below granted the motion to dismiss (R. 1, 13, 15-16).

An appeal was taken from the Order Dismissing the Bill of Complaint to the Court of Appeals for the Fifth Circuit. The Court of Appeals affirmed the judgment, although in its opinion it conceded that the Second, Third and Ninth Circuits have each reached an opposite rule of law, albeit upon "a completely false premise" (17, 22, 24).

Review of Previous Decisions

Following the enactment of the Longshoremen's and Harbor Workers' Compensation Act in 1927, the Bureau of Employees' Compensation uniformly ruled, until the instant case, that a bigamous marriage by the wife of a deceased employee while living apart from her husband for justifiable cause or by reason of his desertion, did not bar her from death benefits under the Act.

The rulings of the Bureau have been contested five times.* In three of the contests, the award of the Deputy Commissioner to the surviving wife was upheld. *Traveler's Insurance Co. v. Norton*, 34 F. Supp. 740 (1940), (E. D. Pennsylvania; *Associated Operating Co. v. Lowe*, 52 F. Supp. 550 (1943), affirmed 138 F. 2d 916 (1943) (C. A. 2); and *Moore Dry Dock Co. et al. v. Pillsbury*, 169 F. 2d 988 (1948) (C. A. 9). In the Fifth Circuit, however, awards by the Deputy Commissioner to such widows were twice set aside, each time upon the ground that the subsequent bigamous marriage terminated the period of separation for justifiable cause and constituted a new and independent reason for living apart from the husband; and as a matter of law operated to forfeit any rights of the wife under the Act. See: *Ryan Stevedoring Co. v. Henderson*, 138 F. 2d 348 (1943), and *American Mutual Liability Insurance Co. v. Henderson*, 141 F. 2d 813 (1944).

Having been thus reversed and twice instructed in the Fifth Circuit's view of the law, the Deputy Commissioners in the Sixth Compensation District departed here from the established practice of the Bureau of Employees' Compensation in other Districts to deny the petitioner an award under the Act. Hence the action below for mandatory injunction by the petitioner.

Summary of Argument

Petitioner's right to recover compensation for the death of her husband under the Act turns upon a showing that she was living apart from her husband by reason of his desertion at the time of his death.

* After the decision of the Deputy Commissioner was rendered in the present case * * * on May 23, 1952. The Fifth Circuit again reversed the award of the Commissioner in *Henderson v. Avondale Marine Ways, Inc.*, 204 F. 2d 178 (Decided May 1, 1953) upon the authority of its earlier decisions.

Petitioner made the necessary showing. Her husband deserted her in 1925. His desertion was never terminated, regardless whether the desertion is determined solely upon a factual basis or upon the legal sense of the term. Inasmuch as the desertion was the continuing cause for the petitioner's life apart from her husband, it was the reason for such life apart at the time of his death.

The Court of Appeals departed from the express language of the statute in holding that the wife's bigamous marriage barred her right of recovery. Its doctrine that the bigamous marriage became an intervening cause for the life apart is not warranted by either a factual or legal analysis of the chain of causation. It was resorted to admittedly to give effect to what the Court conceived to be the "spirit and purpose of the Act".

As a principle of statutory interpretation, the Court was in error in invoking the purpose of the act to justify narrow construction in order to deny an award. In any event, the Court's understanding of the act's purpose was mistaken. An analysis of its legislative history and the statutes in *pari materia* indicates that there was no Congressional purpose to limit compensation only to dependents of covered employees. The Court of Appeals incorrectly read such a purpose into the act and upon that primary ground denied recovery to the petitioner.

The alternative ground used by the Court below to bar the petitioner's recovery is obviously a makeweight. It was not founded on the findings of facts, for there is no showing that the Deputy Commissioner based his decision on the wife's refusal to return to her husband in 1951, nor do the findings justify a conclusion that the husband *endeavored* to seek the return of his wife. Nor was the Court's ruling based upon a proper application of the law with respect to desertion. The Court was required to determine

the existence of desertion in accordance with its legal criteria. Those standards bar reliance upon an offer of reconciliation, made after the consummation of the desertion or made by a guilty party whose misconduct has not ceased, as a means of terminating the desertion. Thus the petitioner's status as a wife living apart by reason of her husband's desertion remained unaffected by her refusal to resume marital relations with her husband.

For these reasons, it is urged that the decision below should be reversed.

ARGUMENT

POINT I

A SUBSEQUENT BIGAMOUS MARITAL RELATION BY A WIFE LIVING APART FROM HER HUSBAND FOR JUSTIFIABLE CAUSE OR BY REASON OF HIS DESERTION DOES NOT BAR HER FROM RECOVERY OF DEATH BENEFITS UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

(A) The Court went beyond the express language of the statute.

It is conceded on the basis of the record that the petitioner was deserted by her husband and that for a period of 15 years she was living apart from him by reason of his desertion. Without the intervention of the petitioner's bigamous marriage, then, the petitioner would have met without challenge from the Court below¹, the statutory requirements for the recovery of death benefits².

The petitioner's relief was denied upon the Court's conclusion that a wife is not living apart from her husband at the time of his death by reason of his desertion or for justi-

¹ The question of the offer of reconciliation is discussed below.

² It is conceded that the petitioner, as the "surviving wife" under Section 9(b) of the Act, 33 U. S. C. 909(b) must qualify as widow under 9(h).

fiable cause "if she has made a new life for herself by living with another man as his wife." (R. 26).

If the Court had warrant for this rule, it must necessarily be found in the statute.

Of the four Circuits which have examined the provisions of the Statute in question here, only the Fifth Circuit has found any language to support its rule.

In the *Moore Drydock Company* case, *supra*, the Ninth Circuit reviewed the statute and came to the conclusion that:

"The Act does not provide that an employee's widow who, while married to such employee, went through a marriage ceremony with another man and thereafter lived with and was supported by him shall not be entitled to a death benefit. Such a provision should not be read into the Act by judicial construction." (Pages 990-991)

In the *Associated Operating Company* case, *supra*, the Second Circuit affirmed per curiam, the decision of the District Court which was equally emphatic: ". . . the law in question," the Court said at one point ". . . does not provide for inquiry, after abandonment, into the wife's subsequent life and conduct", and at another point: "I can find no authority for adding to the Statute provisions which are not even by fair inference to be found in it." (Page 553).

So too was the finding of the District Court in the *Traveler's* case, *supra*. There the Court was urged to bar the claim of the widow upon the grounds relied upon below and was cited a decision³ under the Illinois Workmen's Compensation Law, which limited benefits to a widow whom the deceased employee was "under legal obligations to support at the time of his injury."

³ *Polakow Corp. v. Industrial Commission*, 336 Ill. 395, 168 N.E. 271.

"The desirability of such a statutory provision may readily be conceded. Nevertheless, had Congress intended that such a rule govern awards of compensation under the Longshoremen's and Harbor Worker's Compensation Act, it could have stated so explicitly. To read such a provision into an unambiguous statute would exceed the proper bounds of the judicial function."

Indeed, it is not clear whether the Fifth Circuit has based its rule upon the express language of the statute, or, by means of a construction of the provisions of the act, upon its view of the legislative purpose. In its original decision on the question in *Ryan v. Henderson, supra*, the Court, without analyzing the issues implicit in its opinion, based the rule upon the "spirit and purpose of the Act". It said:

"The evidence clearly shows that the orginal separation was for justifiable cause and that such cause continued for a long time after the separation. We think, however, it cannot be said that at the time of (the husband's) death (the wife) was then living apart for justifiable cause, for there had intervened (her) bigamous marriage . . . The bigamous marriage brought an end to the period of separation for justifiable cause and (the widow) thereby forfeited any rights she had to recover benefits in the event of her lawful husband's death. *Any other holding would do violence to the spirit and purpose of the Act.*" (Italics supplied). (At Page 349).

In its second decision on the issue in *American Mutual Liability Insurance Co. v. Henderson, supra*, the Court confined its explanation to the simple statement that the wife's subsequent bigamous marriage "was in derogation of her relationship as the lawful wife" of (the decedent) and became the independent cause of her living apart from her husband at the time of his death." (Page 814).

In the opinion below, however, its third decision on the question, the Fifth Circuit referred to:

"... the precise terms of the statute which requires for recovery that 'at the time of his death', the woman claiming as 'widow' either be *living with* or dependent for support upon her husband, or, if she is living apart from him, that she is doing so for *justifiable cause* or by reason of his *desertion at that time.*" (R. 25).

If the Court relied upon the words of the statute, without more, it could not have concluded that the petitioner failed to meet the requirements of the Act.

For whether the desertion be regarded as a question of fact, (Respondents' Brief in Opposition, Page 10, Par. 2) or in its legal significance, (*Behrend v. Weeks*, 77 App. D. C. 341, 135 F. 2d 258 (1943)), the husband's desertion of the petitioner inescapably was the originating cause for her abandonment and for her life apart and, as such, lost none of its causal qualities from the date of the desertion until the date of her husband's death.

The Fifth Circuit reached its result only by resorting to a doctrine of "intervening cause" by which it sought to negate the continuum of the desertion. It is a concept which, if it has place in domestic relations jurisprudence concerned with equities *inter se* and moral judgments, has no role whatsoever in the field of workman's compensation. Needless to say, the wife's eligibility for compensation is not to be measured against her ability to obtain a divorce. Neither the statute gives authority nor do the favored principles of statutory construction of compensation laws endorse such a concept. *Associated Operating Co. v. Lowe, supra;* *In the Matter of Rose Munoz*, Employees' Compensation Appeals Board, Federal Security Agency, Docket No. 48-114.

It is true that in its opinion below, the Court disavowed

its reliance upon the fact of the "immoral life" of the wife. However, in the *Ryan* decision, *supra*, the Court cited as authority in preference to the *Traveler's Insurance Company* case, *supra*, a Maine decision which expressly relied upon the spouse's ability to obtain a divorcee as a criterion for eligibility for workmen's compensation. *Scott's* case, 117 Me. 436, 104 A. 794. Moreover, in *American v. Henderson*, *supra*, the Court gave explicit cognizance to the principles of divorce law by describing the bigamous marriage as a derogation of the marital relationship. Whether all of the vestiges of that reasoning have disappeared from the judicial thinking below is, of course, a matter of conjecture.

Apart from the doctrine of "intervening cause", implicit in the opinion below is the concept of dependency. The reference in the *Ryan* decision to the "spirit and purpose of the Act" and the emphasis in the present opinion on the wife's making a "new life", suggest that the Court was concerned with the absence of a *familial nexus* and with the wife's severance of any emotional and economic dependence upon her deserting husband. As the Court said of the *Moore Dry Dock* case, *supra*, ". . . by showing that she had set up a new marital establishment on a permanent basis . . . it would show . . . that she was not the widow of the deceased but another man's wife". (R. 26).

The act, of course, does not limit the recovery of compensation to a showing of dependency. To the extent that the Court below based its decision upon the view that the spirit and purpose of the statute require a showing of dependency, it is in manifest error.

(B) A review of the legislative history of the act together with a consideration of the statutes in *pari materia* indicate that the authority for the ruling below cannot be bottomed upon the "purpose and the spirit of the act".

If an unambiguous statute needs aids for its construction, (*Gemsco Inc. v. Walling*, 324 U. S. 244, 89 L. ed. 921, 933, 65 S. Ct. 605, (1945)) the Court below can derive little support for its rule from either the legislative history of the Longshoremen's and Harbor Worker's Act or from a review of the statutes in *pari materia*.

The present act followed two previous attempts by the Congress to legislate in the field of workmen's compensation for maritime workers. *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 64 L. ed. 834; and *Washington v. Dawson & Co.* 264 U. S. 219; 68 L. ed. 646. The fate of its previous legislation before this Court led the Congress to the enactment of uniform and a general statute covering maritime employees engaged as harbor workers and longshoremen. In drafting the legislation, the responsible Congressional Committees made a comparative analysis of all of the workmen's compensation acts then in effect. See: *Hearings, Committee on the Judiciary, House of Representatives*, 69th Congress, 1st Session, on H. R. 9498, "To Provide Compensation for Employees Injured and Dependents of Employees Killed in Certain Maritime Establishments"; 2nd Session on H. R. 12063; *Hearings, Senate Committee on the Judiciary*, 69th Congress, 1st Session, on S. 3170, "Compensation for Employees in Certain Maritime Establishments".

The statute which was ultimately adopted was intended to embody the more liberal features of all of the compensation acts. *Senate Hearings*, Page 37; *House Hearings*, H. R. 9498, Page 26-28, H. R. 12063 p. 2. Neither the congressional hearings and reports nor the congressional debate disclose any information regarding the definition of "widow" under the Statute. *H. Report 1767, S. Report 973*, 69th Congress.

However, the Congress had before it a variety of statutory

widows from which to make its choice. The pattern of virtually all of the state workmen's compensation legislation based the widow's eligibility for benefits upon (1) relationship alone, and/or (2) dependency. Thus, the New York statute, upon which the Congress modelled most of the other provisions of the Longshoremen's and Harbor Worker's Compensation Act, makes the wife's relationship the sole requirement for recovery.⁴ The Massachusetts Act, on the other hand, incorporates within the law a built-in dependency clause⁵. Other states have limited the conclusive presumption of dependency to wives who are living with their husbands and have made the question of dependency for wives who are living apart solely one of fact.⁶

The Congress, as a reading of the act reveals, chose none

⁴ Chapter 816 of the Laws of New York as Amended and reenacted by Chapter 41 of the Laws of 1914, constituting Section 16 (2), Chapter 67, Consolidated Laws of New York as Amended. The New York Law is followed in this respect by Alaska, New Jersey, Oklahoma. See Schneider, Workmen's Compensation Laws.

⁵ The Massachusetts Act first defines "dependents" to be "members of the employee's family or next of kin who are wholly or partially dependent" upon the employee and then, it provides for a conclusive presumption with respect to certain persons. Chapter 152, Section 32, Annotated Laws of Massachusetts:

Dependents—The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee: (a) A wife upon a husband with whom she lives at the time of his death, or from whom, at the time of his death, the department shall find the wife was living apart for justifiable cause or because he had deserted her. The findings of the department upon the questions of such justifiable cause and desertion shall be final."

The Massachusetts pattern, with variations, is followed by Alabama, Arizona, Georgia, Kentucky, Louisiana, Maine, Nebraska, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah. Schneider, Workmen's Compensation Laws, *supra*.

California, Illinois and Indiana depart from the Massachusetts pattern in that the conclusive presumption runs only to wives whom the husband is under a "legal obligation to support." Schneider, Workmen's Compensation Laws, *supra*.

⁶ Ohio, New Mexico. Schneider, Workmen's Compensation Laws, *supra*

of these patterns. It rejected relationship alone as a basis for the wife's eligibility. Nor was dependency made the sole criteria, except for payment of compensation to a "dependent husband."⁷ Reliance upon any conclusive presumptions to establish dependency was avoided, whether based on a "legal obligation to support", or upon a showing of "desertion by the husband or a life apart for justifiable cause".

Thus, although dependency may be invoked in favor of a liberal construction of the statute to uphold an award (*Baltimore & P. S. B. v. Norton*, 284 U. S. 408, 414, 76 L. ed. 366, 370, 52 S. Ct. 187 (1932)), the absence of dependency may not be invoked to support a narrowing of the statute to forbid an award.

In addition to the fund of definitions of "widow" and "surviving wife" available in the state compensation laws, the Congress was able to draw upon its own supply in the various federal compensation laws. During the very session in which the Longshoremen's and Harbor Workers Compensation Act was enacted, the Congress amended the Federal Employees' Compensation Act, 39 Stat. 742, 5 U. S. C. 751 et seq., in order to extend the statutory criterion of widowhood beyond that of dependency to include widows "living apart for reasonable cause or by reason of his desertion"⁸. Congress has relied on other definitions for other purposes. Thus, under National Service Life Insurance Act, 38 U. S. C. 802 (g) 56 Stat. 159, and the Social Security Act, 64 Stat. 511, 42 U. S. C. Suppl. V, 416 (h), relationship alone is the test of being a widow, and its determination is made in accordance with the law of the state. See: *Castor v. United States*, 174 F. 2d, 481 (6th

⁷ Section 9 (b), 33 U. S. C. 909 (b).

⁸ See C. 110, 44 Stat. 1086, and Senate Report No. 1324, 69th Congress, Second Session.

Cir.); and *Kandelin v. Social Security Board*, 136 F. 2d 327 (2nd Cir.). In the Civil Service Retirement Act, 5 U. S. C. Supp. IV, 724 (4)(d)(1) 46 Stat. 468, as amended by 62 Stat. 55, however, the Congress limited the term "widow" to a surviving wife of an individual who either "(A) shall have been married to such individual for at least two years immediately preceding his death, or (B) is the mother of issue by such marriage".

In the various veterans' pension acts, the Congress chose still other standards. The statutes originally provided inter alia that "No pension under any law of the United States shall be granted, allowed, or paid to the widow . . . unless such wife shall have lived and cohabited with (the veteran) continuously from the date of the marriage to the date of his death." 22 Stat. 373; 38 U. S. C. 192. Subsequently, the pension acts relaxed the requisite for continuous cohabitation in cases in which there was a separation which was due to the misconduct of or procured by the veteran without fault of the widow." See World War Veteran's Act of 1924, as amended 52 Stat. 353, 38 U.S. C. 505a. However, the Congress has made misconduct on the part of the widow an absolute bar to her right to receive pensions, by providing that ". . . the open and notorious adulterous cohabitation of a widow who is a pensioner shall operate to terminate her pension from the commencement of such cohabitation." 22 Stat. 345, 38 U. S. 199.

A review of the statutes in *pari materia* clearly indicates that the Congress applied, when it chose to do so, the standards it favored for the payment of various forms of compensation. It is axiomatic, therefore, that the Congress having chosen in the present act to apply no requirement of dependency, factual or legal, or, (if it be relevant), of morality, it cannot be deemed by the judiciary to have in-

tended such criteria. For this reason, apart from the necessity of following the express language of the statute, the reliance of the Fifth Circuit upon what it conceived to be the "spirit and purpose of the Act" was erroneous.

POINT TWO

THE COURT BELOW WAS IN ERROR IN REJECTING AN AWARD TO THE PETITIONER UPON THE GROUND THAT THE DECEDENT HAD ENDEAVORED TO HAVE THE PLAINTIFF RETURN TO HIM AND SHE HAD REFUSED TO DO SO.

(A) The Court below went beyond the findings of the Deputy Commissioner in order to reach the conclusion that the decedent *endeavored* to have his wife return to him.

An examination of the findings of fact entered by the Deputy Commissioner indicates that the denial of the petitioner's claim for compensation was in no way based upon her refusal to resume a marriage relation with her husband. The record shows that in his findings, the Deputy Commissioner adopted the date of the petitioner's bigamous marriage ceremony in 1940 as the terminal date of her separation from her husband for justifiable cause or by reason of his desertion. Thus the conversation between the petitioner and her husband in 1951, her refusal to resume the relationship of husband and wife, and the absence of any intent to resume the relationship in 1951 are all immaterial to the conclusion of the Deputy Commissioner that the petitioner was not living apart for justifiable cause or by reason of desertion at the time of the decedent's death. The immateriality of the 1951 occurrences to the Deputy Commissioner's findings is demonstrated by the absence of any findings (1) with respect to the effect of the termination of the wife's bigamous marital relation in August, 1949, (2) that from the terminal date of the wife's bigamous

marriage to the date of the husband's inquiry, the wife was living apart from her husband for justifiable cause or by reason of his desertion (in view of the admitted continuation of the relationship between the husband and his bigamous "wife"); and (3) that the wife's refusal to resume marital relations with her husband terminated such life apart for justifiable cause or by reason of her husband's desertion.

The Court below was, of course, bound by the findings of fact as they were made by the Deputy Commissioner. (*Marshall v. Pletz*, 317 U. S. 383, 388, 87 L. Ed. 348, 352-3. Inasmuch as the alternative ground upon which the Court relied was not derived from the Deputy Commissioner's findings, the Court below committed error in so basing its decision.

Assuming arguendo, that the Court of Appeals has the authority to make what are in effect its own findings, the statement, qua findings, in the decision that the decedent "endeavored" to have the plaintiff is not supported on the record. The findings of fact, which recited in some detail the history of the marital relations of the petitioner and the decedent with others as well as with each other indicate that prior to his desertion the husband had committed adultery with Sallie Williams, that following his desertion he lived with Sallie Williams until 1949, and that from 1949 until his death Sallie returned to visit with the husband two or three times. It was in this context that it was found that the husband on a sole occasion during the entire period, three weeks prior to the date of his injury, "asked Julia Thompson if she 'would take him back' and Julia Thompson refused". To term as an "endeavor" this single query by the husband, phrased in the subjunctive and posed in the context of a long desertion and a prolonged marital infidelity (which even at that moment did not ap-

pear to have been terminated), is so exaggerated as to be without any foundation on the record.

If, as a simple issue of fact, the husband's conduct did not constitute an endeavor to seek the return of his wife, there is, of course, no basis for the alternative ground of the decision below.

(B) The Court of Appeals as a matter of law could give no weight to the husband's query to his wife, the wife's refusal to resume the marital relation, or the absence of an intent by the wife to live with her husband again.

Even were there a factual basis for the Fifth Circuit's conclusion, there is posed the question of law, here as in the effect of the wife's bigamous marriage, whether under the statute the Court can enquire into the spouse's conduct after the husband's desertion. The question as to both elements of conduct is whether subsequent acts of the wife, or of the husband, can *intervene* after the husband's desertion to alter the wife's status as one living apart by reason of the desertion. The subsequent acts might be a bigamous marriage, other acts of immorality, a refusal by the wife to return to her husband, or as here, a negative answer to a question whether she would return. For the reasons discussed earlier, it is submitted that once the desertion has been established, no subsequent conduct can be invoked as a bar to the wife's recovery of compensation.

In the consideration of the effect of the wife's subsequent bigamous marriage upon her status as a wife living apart by reason of desertion, the petitioner did not discuss whether the term, *desertion*, in the statute connotes its meaning in law or in fact. In the petitioner's view of the statute, as we have stated, either rule precludes the Court from holding that the bigamous marriage negated the effect of the husband's desertion as the reason for the petitioner's life apart at the time of his death.

Petitioner concedes that this is not so with respect to

the husband's endeavor, if it be endeavor, to resume a marriage relation with his wife. Implicit in petitioner's analysis is the concept that while the elements of desertion must be proved as facts, the criteria of desertion must be determined from its legal significance.⁹ If this be so, then by any legal standard, the wife is under no obligation to accept an offer of reconciliation after the husband's desertion has been consummated.

The petitioner recedes from the position stated in her Petition for Writ of Certiorari that the Court of Appeals must adhere to Florida's law with respect to desertion. But she submits that the rule stated in *Wright v. Wright*, 87 So. 156 (1921) is adhered to by every jurisdiction¹⁰, and that because of its universality it is encompassed within the guides for the determination of desertion:

"Whatever may be the duty of either spouse during the period when the cause of action on the ground of desertion is incubating, there is no obligation upon the part of either, after the desertion has been wilful, obstinate, and continued for the period of a year, to resume the martial relations."

In that action an offer of reconciliation came twenty months after the desertion and eight months after the cause of action accrued. The Court said:

⁹ See *Behrend v. Weeks, supra*, at P. 258:

"The term 'justifiable cause' is familiar in connection with divorce and separation. It is substantially equivalent to 'a matrimonial offense'. We think Congress used the term in its legal sense." *Newman's Case*, 222 Mass. 563, 111 N.E. 359. This decision goes beyond *Behrend* and requires a showing of eligibility for divorce. *Broughay v. Mowrey Grain Co.* (R.I. 1938), 200 A. 773, which is sometimes cited as *contra*, does not deprive the terms of a legal meaning, but holds merely that the words are not to be tested against a petition for divorce. "Whether or not such living apart for reasons not amounting to a defense to a petition for divorce constitutes in any given case a justifiable cause is a question of law and fact. . ." (Emphasis supplied).

¹⁰ 27 Corpus Juris Secundum 576 et seq.

"... (the offer) came too late, as the desertion had been obstinate, wilful, and continued for a year, and after such a desertion the injured party is within his rights if he declines to resume marital relations."

Whatever the statutory requirements may be as to the period of desertion, the rule is that an offer of reconciliation which comes after the desertion comes too late to affect the desertion. Thus the Court below, bound by these broad legal criteria, was in error in holding that the wife's refusal to return to her husband some twenty-five years after he had left her for another woman overcame the effect of his desertion as the reason for her living apart from him.

Moreover, an offer of reconciliation is ineffective if there is continuing misconduct by the party offering reconciliation.¹¹ In view of the findings by the Deputy Commissioner that the relations between the husband and his bigamous wife continued after her move to New Jersey, and the absence of any finding that the husband's adulterous relationship had been terminated, the Court below was in error, on this ground alone, in giving weight to the husband's query.

Inasmuch as the Court of Appeals was mistaken both as to the fact of the endeavor and as to the law of its effect, the alternative ground upon which it sustained the judgment of the District Court below gives way. It cannot therefore be relied upon to deny the petitioner her relief.

Conclusion

The grounds upon which the petitioner's eligibility for compensation has been challenged are twofold. First, is that the statute permits inquiry into the wife's conduct after she has been deserted by her husband in order to

¹¹ 27 Corpus juris Secundum 578.

terminate the desertion. The desertion, viewed either as a fact in the marital relation or as a legal concept, is a continuum. There is neither language nor purpose in the statute to justify the use of conduct subsequent to the desertion, whether it be a bigamous marriage or refusal to resume the marriage, to negate the effect of the desertion in the marriage. The petitioner's status as a wife living apart from her husband by reason of his desertion at the time of his death, therefore, cannot be denied under the Longshoremen's and Harbor Workers Act.

The second ground for challenge is even less substantial. It is that the husband endeavored to have his wife return to him and that she refused. On the facts, the Court of Appeals was in error as to the endeavor. Even if the fact of the endeavor be conceded, the legal criteria for determining the existence of desertion, upon which the Court must rely, bar the use of offers made after the desertion has been consummated.

Petitioner submits for the foregoing reasons that the decision below was in error and should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 352

JULIA THOMPSON, PETITIONER

v.

RICHARD P. LAWSON, AS DEPUTY COMMISSIONER OF
THE UNITED STATES BUREAU OF EMPLOYEES' COM-
PENSATION, SIXTH COMPENSATION DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH
CIRCUIT

MEMORANDUM FOR RESPONDENT DEPUTY COMMISSIONER

Following its earlier decisions in *Ryan Stevedoring Co. v. Henderson*, 138 F. 2d 348 and *American Mutual Liability Ins. Co. v. Henderson*, 141 F. 2d 813, the court below has held that the term "widow", as defined for the purposes of death benefit eligibility in Section 2(16) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. 901 *et seq.*,¹ does not

¹ Section 2(16) of the Act (33 U.S.C. 902 (16) provides that:

The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.

It is accepted that a woman must be a "widow" as so defined in order to qualify for the death benefits accorded a

encompass petitioner who, although legally married to the deceased longshoreman at the time of his death, (1) had been deserted by the longshoreman twenty-five years prior thereto and (2) had contracted a bigamous marriage while living apart from him. This holding, as the court below recognized, is in conflict with the decisions of the Second and Ninth Circuits in *Associated Operating Co. v. Lowe*, 138 F. 2d 916 and *Moore Dry Dock Co. v. Pillsbury*, 169 F. 2d 988,² which hold in effect that if the legal wife of the longshoreman establishes a separate residence, by reason of her husband's desertion or for "justifiable cause", she comes within the scope of Section 2(16) of the Longshoremen's Act even though she subsequently enters into a bigamous or otherwise illicit relationship with another man.

We have been advised by the Bureau of Employees' Compensation that the question here presented is one of importance not only in the administration of the Longshoremen's Act and the other workmen's compensation schemes adopting its provisions,³ but also in the administration of the Fed-

"surviving wife" by Section 9(b) of the Act (33 U.S.C. 909(b)). *Weeks v. Behrend*, 135 F. 2d 258 (C.A.D.C.); *Moore Dry Dock Co. v. Pillsbury*, 169 F. 2d 988 (C.A. 9); *Williams v. Lawson*, 35 F. 2d 346 (C.A. 5).

² In the *Moore Dry Dock* case, the Ninth Circuit said of the previous decisions of the Fifth Circuit on this point: "To the extent that these decisions support appellants' contention, we deem them erroneous and decline to follow them". 169 F. 2d at 990.

³ The Longshoremen's Act serves as the workmen's compensation statute of the District of Columbia. Act of May 17, 1928, c. 612, § 1, 45 Stat. 600, D. C. Code (1951) § 36-501. In addition, it is applicable at present to civilian employment

eral Employees' Compensation Act, 39 Stat. 742, as amended, 5 U.S.C. 751 *et seq.*, which in Section 10(H) (5 U.S.C. 760(H)) defines "widow" in almost identical terms. And the conflict in decisions necessitates, as here, the denial of death benefits by Deputy Commissioners within the bounds of the Fifth Circuit in circumstances where Deputy Commissioners having jurisdiction over many of the active east and west coast ports are obliged to act favorably on the surviving wife's claim. There is nothing in either the Longshoremen's Act or its legislative history to justify this lack of uniformity.⁴

For these reasons, review by this Court of the decision below appears warranted. We do not, therefore, oppose the granting of the petition.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

OCTOBER, 1953.

at military, air, and naval bases outside the United States. Act of August 16, 1941, c. 357, § 1, 55 Stat. 622, as amended, 42 U.S.C. 1651.

⁴ The Social Security Act expressly provides that an applicant's status as the wife of the deceased employee is to be determined by reference to state law. Act of August 28, 1950, c. 809, Title I, § 104(a), 64 Stat. 511, 42 U.S.C. Supp. V, 416(h) (1). While the Longshoremen's Act is silent in this respect, it has been judicially interpreted as if it contained such a provision. *Bolin v. Marshall*, 76 F. 2d 668 (C.A. 9). As has been universally recognized, however, the legal wife's entitlement to benefits under the Longshoremen's Act presents a federal question—namely the construction of § 2(16) of the Act. See cases cited in text pp. 1-2 *supra*.

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SUPPLEMENTAL MEMORANDUM FOR RESPONDENT DEPUTY COMMISSIONER

On December 14, 1953, this Court granted the petition for a rehearing filed by respondents Gulf Florida Terminal Company and American Mutual Liability Insurance Company, and vacated the order entered on November 16, 1953, granting the petition for a writ of certiorari to the Court of Appeals for the Fifth Circuit. It is our understanding that the petition for certiorari now will be further considered by the Court in light of the brief in opposition that has been submitted by these respondents.

The initial memorandum on behalf of respondent Deputy Commissioner set forth our belief that review by this Court is warranted to resolve a conflict between the Circuits on a question of importance in the administration of the death benefit provisions of both the Longshoremen's and Harbor Workers' Act, 44 Stat. 1424, 33 U.S.C. 901 *et seq.* and the Federal Employees' Compensation Act, 39 Stat. 742, as amended, 5 U.S.C. 751 *et seq.*, which in relevant part is in *para materia*. As was there noted, the court below in the instant case has followed its earlier decisions¹ to the effect that, as a matter of law, the term "widow", as it is defined in Section 2(16) of the Longshoremen's Act, does not encompass the legal wife of a deceased longshoreman who, although living apart from him *ab initio* "for justifiable cause or by reason of his desertion", subsequently entered into a bigamous or common law relationship with another individual. This holding, as the Fifth Circuit expressly recognized, does not accord with the view of the Second and Ninth Circuits, which is that a post-separation relationship on the part of the wife can have no bearing upon her status as the "widow" entitled to death benefits.²

Respondent employer and its insurance carrier concede, as they must, the existence of the conflict in this respect (Pet. for Rehearing, p. 3). They

¹ *Ryan Stevedoring Co. v. Henderson*, 138 F. 2d 348 and *American Mutual Liability Ins. Co. v. Henderson*, 141 F. 2d 813.

² *Associated Operating Co. v. Lowe*, 138 F. 2d 916 (C.A. 2); *Moore Dry Dock Co. v. Pillsbury*, 169 F. 2d 988 (C.A. 9).

contend, however, that it assumes no significance in the disposition of the present litigation since the Deputy Commissioner further found that on June 7, 1951, some twenty-five years after the desertion, the longshoreman had inquired as to whether petitioner would take him back and, having no intention of ever living with him again, she had responded in the negative (R. 10). The Fifth Circuit took this event to supply an additional basis for the affirmance of the Deputy Commissioner's order denying petitioner's claim for compensation.³

While cognizant of this alternative ground advanced by the court below, we did not discuss it in the prior memorandum for several reasons. In the first place, it is far from clear that the Deputy Commissioner's determination that petitioner was not living apart from the longshoreman at the time of his death "for justifiable cause or by reason of his desertion" was grounded to any extent upon the refusal of the wife to accept the belated offer to resume marital relations. The Deputy Commissioner was undoubtedly aware that, under the prior holdings of the Fifth Circuit (see fn. 1, *supra*), petitioner's bigamous marriage in itself required the rejection of her claim. Accordingly, there was no necessity for him to consider the effect of this re-

³ The court said: "We are in no doubt that [the *Ryan Stevedoring Co.* and *American Mutual Liability Ins. Co.*] cases were correctly decided and should not be departed from. But if we are incorrect in the view that they were well decided on their facts, the judgment should still be affirmed, since it is undisputed and found that three weeks before his death the deceased had endeavored to have the plaintiff return to him and she had refused to do so". (R. 26.)

fusal. And had the Deputy Commissioner deemed petitioner to have been under some form of obligation to accept the longshoreman's offer to return, it is reasonable to suppose that he would have so stated in clearer terms. Although we do not necessarily subscribe to petitioner's view that state divorce law is the proper criterion for evaluating a wife's status for the purposes of Section 2(16) of the Longshoremen's Act (Pet. 6, 7), irrespective of the applicable standard there is considerable force to the argument that, after a twenty-five year separation, a wife is justified in taking a casual offer of reconciliation as affording insufficient basis for returning to the husband. It is significant in this connection that, insofar as the Deputy Commissioner's findings show, the offer made here was not coupled with any assurance by the longshoreman that he would in future fulfill his marital obligations to petitioner.

Even if the administrative determination rested in part upon considerations other than petitioner's bigamous marriage, the case still merits review. The fact remains that the Fifth Circuit chose to place its decision primarily on its prior holdings⁴ and, in doing so, it has made it plain to the Deputy Commissioners within its bounds that, notwithstanding the views of the other Courts of Appeals, it will not uphold an award of compensation to a woman in petitioner's situation. Thus, as long as

⁴ The District Court, on its part, confirmed the order rejecting compensation solely on the authority of these holdings (R. 15, 16).

the conflict remains, the proper administration of the Longshoremen's Act will be substantially impaired.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

DECEMBER 1953.

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COMPENSATION, SIXTH COMPENSATION DIS-
TRICT, ET AL.

On Writ of Certiorari to the United States Court of
Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT DEPUTY COMMISSIONER

OPINIONS BELOW

No opinion was written by the United States District Court for the Southern District of Florida. The opinion of the United States Court of Appeals for the Fifth Circuit (R. 23-26) is reported at 205 F. 2d 527.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1953 (R. 27). The petition for a writ of certiorari was filed on September 16, 1953 and was granted on November 16, 1953 (R. 28). By order of December 14, 1953, the order granting the petition was vacated. On January 4, 1954, certiorari was again granted. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the legal wife of a longshoreman killed in the course of his employment is his "widow" within the meaning of Section 2(16) of the Longshoremen's and Harbor Workers' Compensation Act in a case where (a) she was deserted by the longshoreman 25 years prior to his death and (b) subsequent to the desertion she entered into a bigamous marital relationship.

STATUTE INVOLVED

Section 2 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. 902, provides in relevant part as follows:

When used in this Act —

* * * * *

(16) The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death; or

living apart for justifiable cause or by reason of his desertion at such time. ,

STATEMENT

By this action for a mandatory injunction, petitioner Julia Thompson seeks to set aside and annul the order rejecting her compensation claim, entered by respondent Richard P. Lawson, Deputy Commissioner, Bureau of Employees' Compensation, for the Sixth Compensation District, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. 901 *et seq.*¹ The pertinent facts may be summarized as follows:

On June 7, 1951, Otis Thompson was employed by respondent Gulf Florida Terminal Company, Inc. as a gang-header in connection with the loading of the *SS Mobilian* in Tampa, Florida (R. 7). While aboard that vessel in the performance of his duties, Thompson sustained personal injuries which resulted in his death on June 15, 1951 (R. 7).

Both petitioner and Sallie Thompson filed claims with the Deputy Commissioner for the death bene-

¹ Section 21(b) of the Act (33 U.S.C. 921 (b)) provides that an injunction proceeding in a district court shall be the manner of obtaining judicial review of compensation orders, and that an order may be set aside "if not in accordance with law." The scope of review is that of the Administrative Procedure Act. *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504.

fits accorded a "surviving wife" by Section 9(b) of the Longshoremens' Act (R. 6). The Deputy Commissioner conducted a hearing in order to determine which, if either, of the two women was the deceased longshoremen's "widow" within the meaning of Section 2(16) of the Act.² The evidence adduced at this hearing showed the following: On January 15, 1921, petitioner and Thompson were lawfully married (R. 7-8). They lived together in Randolph County, Georgia, from that date until November 1925, when Thompson deserted petitioner and moved to Tampa, Florida, where he lived until his death (R. 8). While the marriage was never terminated by divorce, Thompson contributed nothing to the support of petitioner or their two children at any time subsequent to the desertion; nor did petitioner seek to compel such support (R. 8). In 1926, however, Thompson commenced an extra-marital relationship with Sallie Williams (R. 9). In 1929, the couple went through a marriage ceremony and remained together until 1949, when Sallie Williams left Thompson and moved to New Jersey (R. 9). Thereafter, she saw Thompson only on occasional

² It is settled that a woman must be a "widow" as defined in Section 2(16) in order to qualify for the death benefits accorded a "surviving wife" by Section 9 (b) of the Act. *Weeks v. Behrend*, 135 F. 2d 258 (C.A.D.C.); *Moore Dry Dock Co. v. Pillsbury*, 169 F. 2d 988 (C.A. 9); *Williams v. Lawson*, 35 F. 2d 346 (C.A. 5).

return visits to Florida which were of short duration (R. 10).

Petitioner, on the other hand, continued to live in Georgia until 1936 when she moved to Florida (R. 8). In June 1940, she bigamously married Jimmie Fuller at Miami, Florida, and ever since then she has been known as Julia Fuller (R. 8). The bigamous relationship continued until 1949 when Fuller obtained a divorce from petitioner in Ohio on the ground of desertion (R. 8-9). In May, 1951, petitioner was approached by Thompson who inquired whether she would "take him back" (R. 10). Having no intention of ever living with Thompson again, petitioner refused to return to him (R. 10).

On these facts, the Deputy Commissioner found that Sallie Williams Thompson was not the lawful wife of the deceased longshoreman³ and that petitioner was not living apart from him "for justifiable cause or by reason of his desertion" at the time of his death, within the meaning of Section 2(16) of the Longshoremen's Act, *supra*, pp. 2-3

³ While the Social Security Act expressly provides that an applicant's status as the wife of the deceased employee is to be determined by reference to state law (Act of August 28, 1950, c. 809, Title I, § 104(a), 64 Stat. 511, 42 U.S.C., Supp. V. 416(h) (1)), the Longshoremen's Act is silent in this respect. It has been judicially interpreted, however, as if it contained such a provision. *Bolin v. Marshall*, 76 F. 2d 668 (C.A. 9); *Green v. Crowell*, 69 F. 2d 762 (C.A. 5); *Keyway Stevedoring Co. v. Clark*, 43 F. 2d 983 (D. Md.).

(R. 10). Accordingly on May 23, 1952, the Deputy Commissioner entered an order rejecting both claims to compensation (R. 11).⁴

On June 11, 1952, petitioner filed her complaint for injunction in the District Court, seeking to set aside and annul the Deputy Commissioner's order on the ground that the "wrong-doing of [petitioner] after she commenced to live apart from the deceased for justifiable cause did not deprive her of the right to the death benefit as his surviving wife and widow * * *" (R. 1-5). Both the employer and the Deputy Commissioner moved to dismiss the complaint (R. 13-15). On December 31, 1952, the District Court granted these motions on the ground that it affirmatively appeared from the findings of fact contained in the compensation order, which had been attached to the complaint, that the rejection of petitioner's claim was correct as a matter of law (R. 15-16). The court cited *Ryan Stevedoring Co. Inc. v. Henderson*, 138 F.

⁴ The Deputy Commissioner's order allowed attorneys fees to counsel for petitioner and Sallie Thompson in the amounts of \$400 and \$300 respectively (R. 10, 11). In addition, the insurance carrier paid \$400 to petitioner's daughter by way of partial reimbursement for the funeral expenses which the daughter had assumed (R. 7).

As far as the record shows, neither of the children born of petitioner's marriage to the longshoreman filed claims for compensation. Their right to death benefits, however, is not conditioned upon petitioner's qualifying as the longshoreman's "widow" for the purposes of Section 2(16). See Sections 2(14), 9(b) (33 U.S.C. 902(14), 909 (b)).

2d 348, and *American Mutual Liability Ins. Co. v. Henderson*, 141 F. 2d 813, in which the Court of Appeals for the Fifth Circuit had held that where the deserted wife undertakes a bigamous or common law relationship with another man she no longer is living apart from her husband for justifiable cause or by reason of his desertion (R. 16).⁵ On appeal, the Court of Appeals affirmed on the authority of its earlier decisions (R. 23-26). In addition the court held that, even if its view as to the effect of the bigamous relationship was in error, the refusal of petitioner to return to the longshoreman upon his request, made three weeks prior to his injury (*supra*, p. 5), formed sufficient basis for the Deputy Commissioner's rejection of her claim for death benefits (R. 26).

SUMMARY OF ARGUMENT

By the terms of Section 2(16) of the Longshoremen's Act, petitioner's eligibility for the death benefits accorded a "surviving wife", under Section 9 of the Act, is wholly dependent upon a determination that *at the time of the longshoreman's death* she was living apart from him "for justifiable cause or by reason of his desertion". The holding below that petitioner, who after being deserted by the longshoreman entered into a bigamous marriage with another man, does not meet

⁵ Accord: *Henderson v. Avondale Marine Ways, Inc.*, 204 F. 2d 178 (C.A. 5).

this test is grounded upon the view, also expressed in earlier decisions of the Fifth Circuit, that the creation by the wife of a new marital relationship destroys the causal connection between the separation and the desertion (or other justifiable cause for the separation). This position conflicts with that of the Second and Ninth Circuits, which is that, insofar as Section 2(16) is concerned, no attention should be paid to the conduct of the wife after she commences living apart for justifiable cause or by reason of her husband's desertion.

Two basic questions arise from this conflict; *first*, may the Deputy Commissioner inquire into petitioner's post-separation conduct, and *second*, if inquiry is permitted, what standards shall he apply in determining the conduct which results in termination of the causal connection between (a) the husband's desertion and (b) the wife's living apart at the time of death? As to the second question, there are two general alternatives:—reference to local domestic relations law or the approach of the court below.

A. The position of the Second and Ninth Circuits rests largely on the absence of express language in Section 2(16) authorizing inquiry into the wife's post-separation conduct or detailing circumstances in which a separated wife may cease to live apart from her husband for "justifiable cause or by reason of his desertion". But that

it was not the legislative purpose to exclude from consideration all post-separation events is demonstrated by the fact that the Section adopts the time of the longshoreman's death as the point of reference for determining the wife's eligibility for death benefits. Furthermore, the total disregard of such events will, on occasion, produce a result plainly inconsistent with the compensatory objective of the Longshoreman's Act, *e.g.*, the granting of benefits to a wife who has unjustifiably refused to return to her husband.

B. Both "desertion" and "justifiable cause" are familiar concepts in domestic relations law. Several state courts, in construing provisions in state workmen's compensation acts similar to Section 2(16), have attached to those terms the meaning that would be given them in a divorce or separate maintenance proceeding. While, in terms of the compensatory purpose of the Longshoremen's Act, there is some reason to equate the right to death benefits with the right to support, this standard has substantial weaknesses. In almost all jurisdictions, the wife seeking separate maintenance must show, as justifiable cause for the separation, some misconduct on the part of the husband. But there is no uniformity among the jurisdictions as to how serious the misconduct must be. Consequently, the Deputy Commissioner, who is sufficiently burdened with his present duties, will be required to develop expertise as to the

separate maintenance law of every state within his compensation district, and will be faced as well with varying choice of law problems.

Moreover, since separate maintenance proceedings are generally deemed equitable in nature, the spouse seeking to enforce rights incident to the marital status may be confronted with the "clean hands" doctrine. A single act of adultery will generally destroy the wife's right to support, whether it occurred while the parties lived together or after there was a separation due to the husband's misconduct. A test which would condition benefits on the showing that claimant's conduct was beyond reproach has no place, however, in the administration of the Longshoremen's Act. This is especially true where the alleged misconduct took place after the separation. And, since the wife's misconduct is simply a defense available to the husband in a separate maintenance action, to invoke a right-to-support test for the purposes of Section 2(16) is unjustifiably to indulge the employer with the presumption that the longshoreman knew of the misconduct and would have raised it as a defense.

C. The court below expressly rejected the theory that it was passing judgment on the morality of petitioner's actions. In its view, the later bigamous marriage destroyed the causal connection between the wife's living apart and the husband's desertion because it amounted to a renunciation

by petitioner of her status as the wife of the longshoreman. It is clear that this interpretation of the bigamous marriage is correct, and, from the standpoint of the Act's purpose to compensate for loss, there is no basis for awarding benefits to a wife who has freely exercised a choice to disavow the marital relationship. A person in petitioner's circumstances can point to no economic or even emotional loss from the death of the longshoreman, and none should be presumed.

The language of Section 2(16) is entirely consistent with the rejection of petitioner's claim on this basis. In realistic terms, after petitioner bigamously remarried she lived apart because she had affirmatively disavowed her marriage to the longshoreman and had become the "wife" of another; she no longer was the longshoreman's wife living apart for justifiable cause. In general application, the criterion adopted by the Fifth Circuit will not impose an untoward or novel burden upon the Deputy Commissioner. The result which should be reached is plain in a case like this. In instances where the post-separation conduct is less decisive in character, it is possible that the record taken as a whole may justify more than one inference as to the wife's purpose. But the Deputy Commissioner often must select between conflicting inferences in the resolution of other questions upon which an award of compensation may hinge and as to which his finding, having a

reasonable foundation in fact and in law, is conclusive.

ARGUMENT

PETITIONER'S UNDERTAKING OF A BIGAMOUS MARRIAGE TERMINATED HER STATUS AS THE WIFE OF THE DECEASED LONGSHOREMAN "LIVING APART FOR JUSTIFIABLE CAUSE OR BY REASON OF HIS DESERTION" WITHIN THE MEANING OF SECTION 2(16) OF THE LONGSHOREMEN'S ACT.

Introduction

Section 2(16) of the Longshoremen's and Harbor Workers' Compensation Act stipulates that the term "widow", for the purpose of determining eligibility for the death benefits accorded a "surviving wife" by Section 9(b) of the Act, encompasses "only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time."⁶ Peti-

⁶ The Federal Employees' Compensation Act, 39 Stat. 742, as amended, 5 U.S.C. 751 *et seq.* has an almost identical provision (5 U.S.C. 760(H)). So do the workmen's compensation statutes of Maine, Massachusetts, Michigan, North Carolina, Rhode Island and Vermont. See Me. Rev. Stat. c. 26 § 2 (1944); Mass. Ann. Laws c. 152, § 32 (1950); Mich. Stat. Ann. § 17.156 (1950); N.C. Gen. Stat. § 97.2 (1950); R.I. Gen. Laws c. 300, Art. II, § 7(a) (1938); Vt. Stats. § 8088 (1947). The New York statute, upon which the Longshoremen's Act was patterned [See H. Rept. 1190, 69th Cong., 1st Sess. p. 2; *Lawson v. Suwanee S. S. Co.*, 336 U.S. 198, 205], requires merely that the claimant be the employee's "surviving wife." New York Workmen's Compensation Law, §16 (McKinney 1946). While the relevant portions of the other state acts vary considerably, most of them require that the wife, if not a part of the decedent's household at the time of

titioner concededly does not come within the first or second test—*i.e.*, although she was the legal wife of the deceased longshoreman, she was neither living with him nor dependent for support upon him at the date of his death. Thus, her right to compensation wholly depends upon a determination that, at the time of the longshoreman's death, she was living apart from him "for justifiable cause or by reason of his desertion".

The evidence adduced at the compensation hearing showed that petitioner commenced living apart from the deceased longshoreman as the consequence of being deserted by him. It further showed,

his death, be actually dependent upon him, See 9 Schneider's *Workmen's Compensation* (3rd Ed. 1950) §§ 1945-1997, for a compilation of the death benefit provisions of all of the American workmen's compensation statutes.

With the exception of the Act relating to widows of World War I veterans, which is discussed below (see fn. 20, *infra*, pp. 27, 28), none of the other federal statutes conferring death benefits uses language similar to that of the Longshoremen's Act. For example, under the Social Security Act, 49 Stat. 620, as amended, 42 U.S.C. 301 *et seq.*, the wife must either be a member of the husband's household, receiving contributions from him towards her support, or the beneficiary of a court order directing him to contribute to her support. See 42 U.S.C. 402(e), 42 U.S.C. Supp. V, 416(c), 416(h)(2). The Railroad Retirement Act of 1937, 50 Stat. 307, as amended, 45 U.S.C. 228a *et seq.*, adopts the same test. See 45 U.S.C., Supp. V, 228e (1). And the Civil Service Retirement Act, 41 Stat. 614, as amended, 5 U.S.C., 691 *et seq.*, defines "widow" as a surviving wife who either was married to the Government employee for at least two years immediately preceding his death or is the mother of issue by such marriage (5 U.S.C., Supp. V, 724(d)(1)).

however, and the Deputy Commissioner found, that after being deserted petitioner (a) contracted a bigamous marriage and held herself out for over nine years as the wife of the other man, and (b) responded in the negative to the longshoreman's inquiry, made a few weeks before his death (some 25 years after the separation was effected), as to whether she would "take him back." On these facts, the Deputy Commissioner determined that petitioner "was not living apart from Otis Thompson at the time of his death for justifiable cause or by reason of his desertion." While denominated a finding of fact, this determination undoubtedly amounted to a conclusion of law, in light of the earlier holdings of the Court of Appeals for the Fifth Circuit that, as a matter of law, a wife does not fulfill the statutory requirement in such circumstances. *Ryan Stevedoring Co. v. Henderson*, 138 F. 2d 348; *American Mut. Liability Ins. Co. v. Henderson*, 141 F. 2d 813; see also, *Henderson v. Avondale Marine Ways, Inc.*, 204 F. 2d 178⁷.

The court below, in upholding the rejection of the compensation claim, has reaffirmed its prior decisions. Its rationale is that the creation by the wife of a new marital relationship destroys the causal connection between the separation and the desertion (or other justifiable cause for the separation). This position is in direct conflict with that

⁷ In these cases, the Fifth Circuit reversed awards of compensation entered by the Deputy Commissioner.

of the Second and Ninth Circuits, these courts being of the view that, insofar as Section 2(16) is concerned, no attention should be paid to the conduct of the wife after she commences living apart for justifiable cause or by reason of her husband's desertion. *Associated Operating Co. v. Lowe*, 52 F. Supp. 550 (E.D.N.Y.), affirmed on opinion below, 138 F. 2d 916 (C.A. 2); *Moore Dry Dock Co. v. Pillsbury*, 169 F. 2d 988 (C.A. 9); see also to the same effect, *Travelers Ins. Co. v. Norton*, 34 F. Supp. 740 (E.D. Pa.).⁸

The Second and Ninth Circuits would require Deputy Commissioners within the bounds of their jurisdiction to act favorably on the claim of a wife, like petitioner, who began living apart from her husband by reason of his desertion—regardless

⁸ Petitioner asserts (Pet. Br. p. 4) that the interpretation given to Section 2(16) by the Bureau of Employees' Compensation in the Department of Labor accords with this view. In support of this assertion she refers to rulings which have been judicially reviewed and reported, claiming that, except in the instant case, deputy commissioners have always awarded compensation to persons in petitioner's situation. We have been unable to determine what conclusions were reached on this question by the various deputy commissioners in circumstances where there has been no judicial review of their orders. In any event, the Bureau of Employees' Compensation itself has never issued any ruling in regard to the proper construction of the Section. As a matter of practice, the deputy commissioners rely principally, in construing the Longshoremen's Act, upon judicial decisions applicable to their territory.

For the views of the Employees' Compensation Appeals Board in construing the comparable provision of the Federal Employees' Compensation Act, see *infra*, pp. 29-30, fn. 21.

of her later conduct, life, or actions. On the other hand, if the wife's post-separation actions are not wholly irrelevant, the additional question remains as to the proper standard to be applied by the Deputy Commissioner in deciding whether the widow is still living separately for justifiable cause or because of desertion. In particular, the issue here is whether, by holding herself out to be the wife of another individual, the wife relinquished her status as the widow of the deceased longshoreman living apart from him by reason of his desertion.⁹

Neither the statutory language nor the legislative history of the Act¹⁰ provides much illumina-

⁹ While the court below advanced, as an independent ground for affirming the Deputy Commissioner's denial of benefits, petitioner's rejection of the belated offer to return to her husband (*supra*, p. 7), we believe, for reasons stated hereafter, that it is doubtful whether much weight may attach to these circumstances in this particular case. See *infra*, pp. 33, fn. 22. There is nothing in the opinions of the other circuits expressly suggesting that the Deputy Commissioner may not take such a rejection into consideration. This is the first case requiring a construction of Section 2(16) in which the rejection of an offer to resume matrimonial living is involved. In *Associated Operating Co., Moore Dry Dock Co.* and *Travelers Ins. Co.*, *supra*, the courts took the question to be the effect of post-separation immoral or unlawful conduct upon the right to compensation benefits. See *supra*, pp. 14-15.

¹⁰ See 67 Cong. Rec. 4119, 10608, 10614; 68 Cong. Rec. 5402, 5414, 5900-5909; S. Rept. 973, 69th Cong., 1st Sess.; H. Rept. No. 1767, 69th Cong., 2nd Sess.; H. Rept. No. 1190, 69th Cong., 1st Sess.; Hearings, Senate Subcommittee on the Judiciary, on S. 3170, 69th Cong., 1st Sess., March 16 and April 2,

tion, and the discussion of these questions must be largely in terms of the over-all statutory purposes: —to require employers to compensate “employees and their dependents *who sustain loss* as a result of personal injuries and deaths occurring in the course of their work, whether with or without fault attributable to employers.” *Balt. and Phila. Steamboat Co. v. Norton*, 284 U.S. 408, 414 (emphasis added). That Section 2(16) is directed to this end of compensating for loss is shown by the circumstance that, although it does not make actual dependency an absolute condition of recovery by

1926; Hearings, House Committee on the Judiciary, on S. 3170, 69th Cong., 1st Sess., June 26, 1926.

Nor is the legislative history of the Federal Employees’ Compensation Act, which as already noted (fn. 6, *supra*, p. 12) defines “widow” in almost identical terms, of much assistance. The statute as first enacted provided that the term “widow” included only the decedent’s wife “living with or dependent for support upon him at the time of his death.” Act of September 7, 1916, c. 458, § 10(H), 39 Stat. 744-745. In 1927, the year the Longshoremen’s Act was passed, the 1916 Act was amended by enlarging the definition of “widow” to include the wife “living apart for reasonable cause or by reason of [the husband’s] desertion.” Act of February 12, 1927, 44 Stat. 1086, 1087. The committee reports indicate that the amendment was made pursuant to the recommendation of the United States Employees’ Compensation Commission. While the supporting memorandum from the Commission was incorporated in both the House and Senate reports, it simply states that the cases that will come under the added proviso “are not numerous and probably can only be determined by personal investigation on the part of the commission, but * * * such cases are quite as meritorious as those described under the terms of the act as it now reads * * *.” See S. Rept. 1324, 69th Cong., 2nd Sess., p. 2; H. Rept. 936, 69th Cong., 1st Sess., p. 2.

the separated wife (as do the comparable provisions of most state workmen's compensation statutes), it is obviously not modeled after the New York proviso (N.Y. Workmen's Compensation Law, Section 16) which automatically equates status as the employee's lawful wife with the right to death benefits (see fn. 6, *supra*, p. 12).

A. The Act Does Not Entitle the Widow to Benefits Merely Because She Was Initially Separated From the Longshoreman for Justifiable Cause.

The Courts of Appeals subscribing to petitioner's view that the Deputy Commissioner may not look into the post-separation conduct of the wife have advanced as the governing consideration the absence of express language in Section 2(16) authorizing such inquiry (*Associated Operating Co. v. Lowe*, 52 F. 2d Supp. 550 (E.D. N.Y.), affirmed, 138 F. 2d 916 (C.A. 2)), as well as the failure expressly to provide that an "employee's widow who, while married to such employee, went through a marriage ceremony with another man and thereafter lived with and was supported by him shall not be entitled to a death benefit." *Moore Dry Dock Co. v. Pillsbury*, 169 F. 2d 988, 990 (C.A. 9). This view seems to be that the failure of the Act to detail the circumstances in which a separated wife may cease to live apart from her husband for justifiable cause (or by reason of his desertion) evidences a Congressional purpose that the burden of a wife in petitioner's situation is

limited to showing that she was originally deserted or that the longshoreman's conduct justified her departure from the matrimonial domicile.

But that it was not the legislative purpose to exclude from consideration all post-separation events is demonstrated by the terms of Section 2(16) itself. It simply cannot be ignored that the Section stipulates that the claimant's status as the surviving wife entitled to the benefits conferred by Section 9(b) of the Act is to be determined *as of the time of the longshoreman's death*. The Section provides (see *supra*, pp. 2-3) that "widow" includes "*only*" the longshoreman's wife "living with or dependent for support upon him *at the time of his death*," or a wife "living apart for justifiable cause or by reason of his desertion *at such time*" (emphasis added). Clearly, if Congress had desired to adopt as a point of reference the time that the parties separated it would have employed language more fitting to that end.

Furthermore, the total disregard of post-separation events will occasion in some instances a result wholly inconsistent with the overall objectives of workmen's compensation. A striking example, not unknown to common experience, is the situation where a deserted wife, in addition to rejecting a genuine offer of her husband to return (made within a reasonable time and accompanied by a suitable promise and expectancy of

reformation), advises him that so far as she is concerned her marital life with him is a closed chapter. In these circumstances, the subsequent death of the husband does not compel or warrant the inference that she has suffered an economic or even an emotional loss. Quite to the contrary, the award of death benefits under those conditions has all the earmarks of a windfall (see p. 31, *infra*).

We think it clear, therefore, that Section 2(16) allows, indeed demands, at least a limited inquiry into the events transpiring after the wife has been deserted by the longshoreman. The pivotal question becomes the permissible extent of this inquiry. In answering the question, there are two approaches which have received judicial support. Apart from the position of the court below—that the wife's living apart for justifiable cause or by reason of the employee's desertion is terminated by conduct on her part which, viewed objectively, constitutes a conscious election by her to renounce her status as wife—there are the holdings of several state courts, in construing similar provisions in state workmen's compensation acts, that local domestic relations law is the applicable criterion. We shall discuss both of these standards.

B. The Act Does Not Hinge the Widow's Entitlement to Benefits on the Local Law of Divorce or Separation.

1. Although neither "desertion" nor "justifiable cause" have been the subject of precise judicial

definition for the purposes of Section 2(16), both terms are familiar in domestic relations law. In most jurisdictions, desertion is one of the statutory grounds for divorce or separate maintenance. Nelson, *Divorce and Annulment* (2nd Ed. 1945), §§ 4.01, 32.13.¹¹ And the concept of "living apart for justifiable cause" has long been employed in determining the rights of the respective spouses in a separate maintenance proceeding (*infra*, pp. 23-26).

It has been suggested by the District of Columbia Circuit that Congress used these terms in the Longshoremen's Act in their "legal sense." *Weeks v. Behrend*, 135 F. 2d 258, 259.¹² And several state courts, in construing comparable provisions in state workmen's compensation acts, have arrived at the same conclusion. *In re Newman's case*, 222 Mass. 563, 111 N.E. 359; *Martilla v. Quincy Mining Co.*, 221 Mich. 525, 191 N.W.

¹¹ As of 1945, desertion was a ground for an absolute divorce in 32 states, the District of Columbia, and several territories and possessions. And all the remaining states except New Hampshire, New York, North Carolina, and South Carolina had adopted abandonment and neglect as a basis for divorce. See table in 3 Nelson, *Divorce and Annulment* (2nd Ed. 1945), preceding p. 615.

¹² The Longshoremen's Act was adopted by Congress as the workmen's compensation statute of the District of Columbia. Act of May 17, 1928, c. 612, § 1, 45 Stat. 600; D.C. Code (1951), § 36-501. In addition, it is applicable at present to civilian employment at military, air, and naval bases outside the United States. Act of August 16, 1941, c. 357, § 1, 55 Stat. 622, as amended, 42 U.S.C. 1651.

1943; *Scott's Case*, 117 Me. 436, 104 A. 749; but cf. *Broughey v. Mowry Grain Co.*, 61 R.I. 221, 200 A. 768. Thus, in *Scott's Case, supra*, the Supreme Court of Maine held that the claimant's adultery, after being deserted by her husband, deprived her of her status, under the state compensation act, as a wife living apart from her husband by reason of his desertion. The court's rationale was that the term "desertion" is used in its normal matrimonial sense and that, if the deserted party furnishes ground for the deserter's remaining apart, desertion ceases to be a wilful and unjustifiable abandonment of one party by the other, and therefore a ground for divorce. The principle that an act of adultery committed by the deserted spouse precludes desertion as a basis for a divorce (or separate maintenance) is, of course, not peculiar to Maine. In numerous, if not in all, jurisdictions, the desertion is terminated when the abandoned spouse engages in adulterous conduct and the deserter becomes justified in continuing to live apart. Nelson, *supra*, § 4.26.

Though the relationship between the right to a divorce and entitlement to workmen's compensation benefits may be obscure, there is some basis for giving "desertion" and "justifiable cause" the same meaning in Section 2(16) as these terms would be given in a separate maintenance proceeding. The mere fact that at the time of the long-

shoreman's death his wife was neither living with him nor being supported by him does not necessarily mean that she has failed to suffer an economic loss. On the contrary, if there was an obligation upon the part of the employee-husband to support her, she has lost the right, exercisable at any time, of seeking a court order compelling him to do so. But where the right to support has been forfeited, it is difficult to see how the wife has been adversely affected economically by the longshoreman's death. Not being able to look to him for support while he lived, she is hardly in the position to contend that she is entitled to compensation by virtue of his death.

2. In spite of the surface plausibility of looking to local separate maintenance law in determining whether the wife's post-separation conduct has affected her entitlement to death benefits, such a test has substantial weaknesses. In the first place, if local law is the decisive factor where post-separation conduct is concerned, consistency dictates that it also be applied where the Deputy Commissioner is called upon to evaluate the cause or justifiability of the initial separation. In almost all jurisdictions, there can be no "justifiable cause" for separation unless there has been some misconduct by the other party. See, e.g., *Weeks v. Behrend*, 135 F. 2d 258 (C.A.D.C.); *Luckenbach Gulf S.S. Co. v.*

Henderson, 133 F. 2d 305 (C.A. 5).¹³ But what may be misconduct sufficient to warrant separation in one jurisdiction may not suffice in another.¹⁴ Consequently, the Deputy Commissioner will be required to develop some degree of

¹³ In the *Weeks* case, the question was whether a wife who lived apart from her husband by mutual consent came within the statutory definition in the Longshoremen's Act. The District of Columbia Circuit held that she did not, based on its view that a wife "who lives apart does so for what is called 'justifiable cause' only when she does so because of her husband's matrimonial misconduct". 135 F. 2d at 259. There was no occasion for the court to pass upon either the question presented here or the issue as to how serious the misconduct must be. In *Luckenbach*, the Fifth Circuit held that, on conflicting evidence regarding the circumstances of the separation, the Deputy Commissioner was entitled to find that the claimant came within Section 2(16). No attempt was made by the court to lay down an applicable standard; the evidence on behalf of the claimant, which the Deputy Commissioner accepted, showed, however, that the longshoreman left the marital domicile after an argument about financial matters and repeatedly refused requests by the wife to return to her.

¹⁴ In some states, the misconduct of the husband must be sufficient to entitle the wife to a divorce. See e.g. *Preston v. Preston*, 116 Fla. 246, 157 So. 197; *Sweat v. Sweat*, 238 Iowa 999, 29 N.W. 2d 180; *Perkins v. Perkins*, 154 Kan. 73, 114 P. 2d 804; *Heinmuller v. Heinmuller*, 133 Md. 491, 105 A. 745; *Potts v. Potts*, 237 Mich. 112, 211 N.W. 74; *Phillips v. Phillips*, 223 N.C. 276, 25 S.E. 2d 848. In others, misconduct of a less serious nature will warrant an award of separate maintenance. See e.g. *Love v. Love*, 239 Ala. 166, 194 So. 555; *Winterberg v. Winterberg*, 177 Ill. App. 493; *Huffman v. Huffman*, 310 Ky. 688, 221 S.W. 2d 649; *Bradford v. Bradford*, 296 Mass. 187, 4 N.E. 2d 1005; *Richman v. Richman*, 129 N.J. Eq. 114, 18 A. 2d 403; *Commonwealth ex. rel. Pinkenson v. Pinkenson*, 162 Pa. Super. 227, 57 A. 2d 720.

expertise in the separate maintenance law of all the states within the bounds of his compensation district, besides being possibly faced with varying choice-of-law problems. It is doubtful whether these functions should be assumed by these busy officials who are sufficiently burdened with the performance of many other duties.¹⁵

There are still more fundamental problems involved in the automatic acceptance of the meaning accorded the statutory terms in a state separate-maintenance action. Since such proceedings are generally taken to be equitable in nature, the spouse seeking to enforce rights incident to the marital status may be confronted with the "clean hands" doctrine.¹⁶ For instance, a single act of adultery generally destroys the wife's right to support whether it took place while

¹⁵ It is true, of course, that the Deputy Commissioner must look to state law in deciding whether the claimant was the "wife" of the longshoreman at the time of his death (see fn. 3, *supra*, p. 5). In the absence of Congressional definition of the term for the purposes of the Act, it is difficult to see any other available point of reference. Cf. *Seaboard Air Line Ry. v. Kenney*, 240 U.S. 489, 493-497; *Weyerhaeuser Timebr Co. v. Marshall*, 102 F. 2d 78 (C.A. 9). And it is a relatively easy matter to determine whether under the law of the matrimonial domicile the claimant and the longshoreman occupied the relationship of husband and wife.

¹⁶ Nelson, *Divorce and Annulment* (2nd Ed. 1945), § 32.03. According to the majority view, the proceeding remains equitable even though sanctioned by statute. *Ibid.* See also Schouler, *Marriage, Divorce, Separation, and Domestic Relations* (6th Ed. 1921), §§ 1319, 1320.

she was still living with her husband (see 10 A.L.R. 2nd 498),¹⁷ or after the parties had separated because of the husband's desertion or other misconduct. See, e.g., *M. Martin Polokow Corp. v. Industrial Commission*, 336 Ill. 395, 168 N.E. 271; *Ellett v. Ellett*, 157 N.C. 161, 72 S.E. 861; cf. pp. 21, 22, *supra*.¹⁸

One may well doubt the wisdom of taking a single post-separation wrongdoing on the part of the wife as sufficient basis for depriving her of any economic assistance from the husband, with all of its consequences not only for the individual but also, where the wife has no independent means of support, for the community at large. In any event, as has been uniformly recognized by the courts of appeals considering this question, a test which would condition benefits upon the showing that the claimant's conduct was beyond reproach has no proper place in the administration of the Longshoremen's Act.¹⁹ This is

¹⁷ See also Nelson, *Divorce and Annulment* (2nd Ed. 1945), § 32.21; Brown, *The Duty of the Husband to Support the Wife*, 18 Va. L.R. 823, 837 (1932).

¹⁸ In the *Polokow* case a woman who had engaged in illicit relations after having been deserted by her husband was held not entitled to death benefits under the Illinois workmen's compensation statute because the statute conditioned the award of such benefits to the wife upon the deceased employee's having a legal obligation to support her.

¹⁹ The opinion of the court below expressly states that the basis for rejection of petitioner's claim was not that "at the time of the death of the husband, [she] was living an immoral life and must be punished therefor." (R. 25).

especially true where, as here, the alleged misconduct occurred *after* the wife had left the husband for admittedly good cause or had been deserted by him. Quite apart from the impropriety of allowing the employer to place the wife on trial at the compensation hearing, thereby subjecting the proceeding to the grossly exaggerated charges and counter-charges which are an integral part of many matrimonial controversies, the fact is that the post-separation misconduct may be causally related to the husband's actions which forced the wife to establish a separate domicile at the outset. While this may not be a relevant consideration in a separate maintenance action, it certainly assumes importance in the area of workmen's compensation. Moreover, the holding that a woman deserted by her husband ceases to live apart by reason of his desertion solely because she has failed to conform to the prevailing moral code would not seem to accord with the mandate that the Longshoremen's Act is to be liberally construed to give economic benefits to the workmen and their families. *Balt. & Phila. Steamboat Co. v. Norton*, 284 U.S. 408, 414; *Harbor Marine Contracting Co. v. Lowe*, 152 F. 2d 845, 847 (C.A. 2), certiorari denied, 328 U.S. 837; *Travelers Insurance Co. v. Branham*, 136 F. 2d 873, 875 (C.A. 4).²⁹

²⁹ Because of this requirement of a liberal construction, the rather narrow administrative interpretation of a similar provision in a veterans benefit statute is not particularly signifi-

Finally, it is significant that the wife's misconduct does not bar her from receiving support payments unless the husband raises the defense. There is no general public policy, to be vindicated by the state or the community, requiring a faulty wife to be cut off from all support. Instead, misconduct is merely a defense available to the husband in a suit brought by the wife to recover separate maintenance. Nelson, *supra*, § 32.21. In compensation proceedings, to invoke a right-to-support test for the purposes of Section 2(16) is to indulge the employer with the presumption that the husband knew of the misconduct and would have raised it as a defense. It is highly questionable whether the employer is or should be entitled to the benefit of that presumption.²¹

cant. Section 3 of the Act of May 13, 1938, c. 214, 52 Stat. 353, as amended, 38 U.S.C. 505a, provides in relevant part that "[n]o compensation or pension shall be paid to a widow [of a World War I veteran] unless there was continuous cohabitation with the [veteran] from the date of marriage to date of death, except where there was a separation which was due to the misconduct of or procured by the [veteran] without the fault of the widow." In an opinion dated September 29, 1947 (No. 882-47), the Solicitor of the Veterans Administration held that "regardless of the reason for the initial separation, a claimant may not be considered as being without fault within the meaning of the statute as to any period during which she cohabited with a man other than the veteran." This statute, it should also be noted, specifically refers to absence of "fault" on the part of the wife—unlike the Longshoremen's Act.

²¹ The law of divorcee, assuming that its application in the administration of a workmen's compensation statute can be

C. Under the Act, the Legal Widow Is Not Entitled to Benefits Where, as Here, the Deputy Commissioner Properly Finds, From a Later Bigamous Marriage or Comparable Conduct, That She Has Terminated Her Status as the Wife of the Longshoreman Living Apart for Justifiable Cause or by Reason of His Desertion.

As we have already noted, the court below, in holding that petitioner's status as the wife of the deceased longshoreman living apart "by reason of his desertion" terminated prior to his death, expressly rejected the theory that it was passing judgment on the morality of petitioner's actions, *supra*, p. 26, fn. 19. In the view of that court, the undertaking by the wife of a bigamous or common law marital relationship requires the withholding of death benefits simply because it amounts to a

justified from any standpoint, presents equal if not greater difficulties. Because many courts regard a divorce action to be an equitable proceeding, the "clean hands" maxim is frequently employed to deny a divorce where there has been marital misconduct on the part of the complainant. And closely related to this maxim, indeed often confused with it, is the doctrine of recri�ination, which permits the respondent to interpose, as an absolute defense to the divorce action, adultery or other misconduct by the claimant which in itself is a ground for divorce. Virtually every jurisdiction recognizes at least one of these concepts; consequently, few persons in the position of either petitioner or the longshoreman could obtain a divorce. It is not significant that the adultery set up by way of recri�ination occurred long after the beginning of the desertion period. And, conversely, in such circumstances the desertion may be interposed as a recri�atory defense to an action based upon the adultery. Nelson, *Divorce and Annulment*, §§ 10.01, 10.02, 10.05, 10.06.

While the Bureau of Employees' Compensation in the Department of Labor has not taken a formal position on the

renunciation of her status as the wife of the employee. Once such a renunciation has taken place, the causal connection between the living apart and the initial misconduct of the husband is deemed to be broken.

It can hardly be disputed that the interpretation placed by the court upon petitioner's bigamous marriage is patently correct. There may be doubt as to petitioner's attitude toward her marriage with the longshoreman during the first fifteen years following the desertion, even though, as the Deputy Commissioner found (R. 8), she made no effort to compel support from him by court decree or otherwise. But by thereafter going through a marriage ceremony with another man, and holding herself out to be his wife (including the adoption of his name), petitioner must be assumed to have made a determination to sever any remaining ties with the longshoreman.

proper interpretation of Section 2(16), the Federal Employees' Compensation Appeals Board, in the administration of the similar provision in Section 10(H) of the Federal Employees Compensation Act (see fn. 6, *supra*, p. 12), has expressed the view that [*In the Matter of Rose Munoz*, (Docket No. 48-114, August 8, 1949) p. 4] :

[T]he status of parties under workmen's compensation law, does not rest solely upon law applicable to divorce, as such law takes largely into account equities *inter se* and moral judgments. Principles applied under the compensation law are not designed to implement moral judgments, but to accomplish social and economic ends,—security for the employee and his family.

In the final analysis, therefore, the force of the petitioner's attack on the judgment below turns not upon whether the Deputy Commissioner was empowered to deny her claim of punishment for the commission of an immoral act, but instead upon the issue whether her freely exercised choice to disavow the marital relationship, as evidenced by the bigamous marriage, deprives her of benefits under the Longshoremen's Act. From the standpoint of the Act's compensatory purpose, the answer seems to us to be in the affirmative. Although indemnification for demonstrable economic loss may not be the sole end that Congress had in mind, the Longshoremen's Act, and the workmen's compensation system in general, are meaningful only if the benefits can be related to a loss of some kind. Cf. *Weeks v. Behrend, supra*, 135 F. 2d at 259; see *supra*, pp. 17, 18. Petitioner does not, and quite clearly cannot, point to a way in which she has been adversely affected by the death of the longshoreman here. Neither economic nor emotional loss has been shown, and neither can be presumed in these circumstances. Moreover, even if the compensatory objective of the Longshoremen's Act be disregarded, petitioner's repudiation of her status as the longshoreman's wife gives a hollow ring to her claim that she should be awarded benefits because of such status.

Section 2(16) is entirely consistent with the rejection of petitioner's claim on this basis. By its terms, the living apart *at the time of death*

must be for "justifiable cause" or by reason of the longshoreman's desertion; in other words, the "living apart" *at the time of death* must be proximately connected to some misconduct of the longshoreman or to some reason for leaving him. Such is not the case in situations of this kind. It is true that the employee's desertion may have influenced petitioner's decision to embark upon a new life with another man. Nevertheless, once petitioner had made that decision, and had carried it out, the causal relation between the original desertion and the living apart disappeared. Realistically viewed, she lived apart thereafter because she had affirmatively disclaimed her marriage to the longshoreman and had become the "wife" of another.

The short of the matter is, we think, that the court below has applied Section 2(16) in this case in a manner which accords with both the ~~statutory~~ language and the over-all purposes of the Act. And there is no reason why its application should result in the imposition of an untoward or novel administrative burden upon the Deputy Commissioners. Admittedly, the determination whether the claimant affirmatively disavowed the marital relationship after separating from her husband for justifiable cause, or by reason of his desertion, will not always be easily made. For, while the undertaking of a bigamous or common law marriage may, in and of itself, warrant a conclusive presumption of disavowal, the same can-

not be said of other acts less decisive in character, *e.g.*, the rejection of an offer to return to the husband or a gratuitous statement by the wife to the effect that she never again intends to resume marital living. In drawing an inference from such conduct, the Deputy Commissioner necessarily must give careful consideration to the setting.²² On occasion, the record taken as a whole

²² This is amply demonstrated by petitioner's rejection of the offer to return to her husband *supra* p. 5. Insofar as the Deputy Commissioner's findings show, the offer was not coupled with any assurance by the longshoreman that he would in future fulfill his marital obligations to petitioner. Leaving aside the question whether under Florida law petitioner was under a duty to accept such a belated offer (see Pet. pp. 6; 7)—a consideration that we believe to be far from decisive for the purposes of the Longshoremen's Act—it is doubtful whether in these circumstances the rejection can be taken as an election on petitioner's part to treat the marital relationship as terminated. After a twenty-five year separation, a wife is justified in taking a casual offer of reconciliation as affording insufficient basis for returning to the husband.

It is far from clear that the Deputy Commissioner's determination that petitioner was not living apart from the longshoreman at the time of his death "for justifiable cause or by reason of his desertion" was grounded to any extent upon the refusal of the wife to accept the belated offer to resume marital relations. The Deputy Commissioner was undoubtedly aware that, under the prior holdings of the Fifth Circuit (See *supra* p. 14), petitioner's bigamous marriage in itself required the rejection of her claim. Accordingly, there was no necessity for him to consider the effect of this refusal. And had the Deputy Commissioner deemed petitioner to have been under some form of obligation to accept the longshoreman's offer to return, it is reasonable to suppose that he would have so stated in clearer terms.

may justify more than one inference as to the purpose and conduct of the claimant. But this is equally a problem in the resolution of many of the other questions upon which an award of compensation may hinge and as to which the Deputy Commissioner's finding is conclusive, if it has a reasonable foundation in fact and in law. Cf. *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 505; *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469; *Del Vecchio v. Bowers*, 296 U.S. 280; *South Chicago Co. v. Bassett*, 309 U.S. 251; *L'Hote v. Crowell*, 286 U.S. 528, explained in *The Admiral Peoples*, 295 U.S. 649, 653-654.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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FEBRUARY, 1954.

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United States

CASE NUMBER 1954-1

No. 352

JOHN THOMPSON,

Plaintiff

v.

RICHARD P. LAWSON,

**and Attorney General of the
State of Florida, Commissioner of Employees' Compensation,
and Workmen's Compensation District, et al.,**

Respondents.

NOTICE FOR RESPONDENTS

**GULF FLORIDA TERMINAL COMPANY,
INCORPORATED,**

**and
AMERICAN MUTUAL LIABILITY INSURANCE
COMPANY**

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 352

JULIA THOMPSON,
Petitioner

vs.

RICHARD P. LAWSON,
As Deputy Commissioner of the
United States Bureau of Employees' Compensation,
Sixth Compensation District, et al.,
Respondents.

BRIEF FOR RESPONDENTS
GULF FLORIDA TERMINAL COMPANY,
INCORPORATED,
and
AMERICAN MUTUAL LIABILITY INSURANCE
COMPANY

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit is reported at 205 F 2d 527. The Order of the District Court appealed from appears on page 15 of the record; the District Court filed no opinion.

Jurisdiction

Petitioner invoked the jurisdiction of this Court under 28 USC 1254 (1). The Court granted certiorari on January 4, 1954.

Restatement of the Question Presented

The petitioner herein has claimed as a "widow" under the Longshoremen's and Harbor Workers' Compensation Act, despite a 25 year separation from the deceased employee (initiated by his desertion). During that period of separation, the petitioner entered into a bigamous marriage with another, refused his invitation to "take him back," and expressed her intention never to resume the relationship of husband and wife with the deceased.

The Deputy Commissioner rejected her claim on the finding that "she was not living apart from Otis Thompson for justifiable cause or by reason of his desertion at the time of his death."

The question is the propriety of the Deputy Commissioner's finding under the facts of this case.⁽¹⁾ We believe that the finding was proper and the claim properly rejected.

(1) The facts are all as found by the Deputy Commissioner (R 7-11). The record before him was never brought up. We still consider, as we did in our Brief in Opposition that the Deputy Commissioner's determination of such non-jurisdictional facts is not to be disturbed on appeal if supported by evidence. *Crowell v. Benson*, 285 US 22, 46; 76 L ed 598, 608; *Cardillo v. Liberty Mutual Insurance Co.*, 330 US 469, 477-478; 91 L ed 1028, 1036. *O'Leary v. Brown-Pacific-Maxon*, 340 US 504; 95 L ed 483.

Statute Involved

The statute involved is the Longshoremen's and Harbor Workers' Compensation Act, Sections 901-950, Title 33, United States Code.

Section 902 (16) defines the term "widow" as follows:

"The term 'widow' includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time."

Statement of the Case

The facts are very succinctly stated by the findings of the Deputy Commissioner on pages 7-11 of the Record. As pertinent to the controversy they may be briefly restated as follows:

The petitioner married Otis Thompson in 1921, two months before her 13th birthday. They lived together for less than five years, during which time she had two children. Otis Thompson deserted her in 1925 and they never lived together as man and wife thereafter. They never were divorced. (R 7-8).

In 1926 Otis Thompson began to live with one Sallie Williams, whom he married in 1929. The petitioner married one Jimmy Lewis Fuller in 1940, who divorced her in 1949. In the same year Sallie Williams left Otis Thompson to work in another state, although she visited him from time to time (R 9-10).

On June 15, 1951, Otis Thompson died from an injury received on June 7, 1951, while employed by Gulf Florida Terminal Company, Incorporated (R 7).

Approximately three weeks prior to his injury, the deceased employee called upon the petitioner at the home of their daughter, and while there asked the petitioner if she would "take him back." She refused (R 10). At the time of the deceased employee's death, the petitioner did not have any intentions of ever again living with Otis Thompson and resuming the relationship of husband and wife (R 10).

OUTLINE OF ARGUMENT

- I. Introduction—The construction which the court of Appeals for the Fifth Circuit placed on the definition "widow" in Section 2 (16) of the Act.
- II. The purpose of the Act, being to provide for injured employees and those dependent on them for support, does not require an extension of dependency benefits beyond the express terms of the statute.
- III. The reason why the parties were living apart at the time of the decedent's death is determinative of the wife's status.
 - A. History of the statutory provisions in the state workmen's compensation acts from which the Longshoremen's and Harbor Workers' Compensation Act was taken.
 - B. State decisions interpreting dependency provision prior to its adoption into the Longshoremen's and Harbor Workers' Compensation Act by the Congress preclude application of term "widow" to petitioner.
- IV. The analogy of separate maintenance and support cases.
- V. The petitioner's reasons for living apart at the time of death of the decedent required the rejection of her claim by the Deputy Commissioner.

ARGUMENT

I. Introduction—The construction which the Court of Appeals for the Fifth Circuit placed on the definition "widow" in Section 2 (16) of the Act.

The narrow question here involves the construction to be placed on a few words in a federal statute, the Longshoremen's and Harbor Workers' Compensation Act. Those words define the term "widow," and limit the definition to:

"Only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion *at such time*. (33 USC § 902 (16), emphasis supplied).

The Court of Appeals for the Fifth Circuit has, by a line of decisions which includes this case,⁽²⁾ found that language to be unambiguous; and has determined that a "widow" meets the requirements of the statute only when an original "desertion" by the husband, or other "justifiable cause" for her living apart from him has continued until the time of the decedent's death, uninterrupted or impeded by her own acts in voluntary derogation of the marriage relationship. As the Court of Appeals said in this case, the reason for its decision is to be found in "the precise terms of the statute" (R 25).

⁽²⁾ *Ryan Stevedoring Co. v. Henderson*, 138 F 2d 348 (1943); *American Mutual Liability Insurance Co. v. Henderson*, 141 F 2d 813 (1944); and the instant case *Thompson v. Lawson*, 205 F 2d 527; and *Henderson v. Avondale Marine Ways, Inc.*, 204 F 2d 178 (1953)

The petitioner attacks that line of decisions of the Fifth Circuit⁽³⁾ on two grounds; (1) that the Court of Appeals misinterpreted "the precise terms of the statute"; and (2) that it misunderstood "the spirit and purpose of the Act," to which the court made a passing reference in the first of its decisions, *Ryan Stevedoring Co. v. Henderson*, 138 F 2d 348, 349. We shall first briefly consider the latter of these two propositions.

II. The purpose of the Act, being to provide for injured employees and those dependent on them for support, does not require an extension of dependency benefits beyond the express terms of the statute.

When the constitutionality of modern workmen's compensation legislation was before this Court in 1917-1918, a most persuasive argument advanced to support its constitutionality under the police power was that without it the injured workman was left to bear the greater part of industrial accident loss and

"... he and those dependent upon him are overcome by poverty and frequently become a burden upon public or private charity...."

New York Central R. Co. v. White, 243 US 188, 197; 61 L ed 667, 672.

The Court, in determining constitutionality, referred to this argument several times. Widow and children ought not to be "deprived of their natural support" (at US p 203). It was not arbitrary and unreasonable for the state to impose upon the employer the absolute duty of compensation in money, in the case

⁽³⁾ Without, curiously enough, finding any unanswerable logic in the cases from other circuits on which the petitioner relies. One page (Petitioner's Brief, pp. 8-9) of a fifteen page argument is devoted to an analysis of these cases.

of an employee's death, "to those who were entitled to look to him for support" (at US p. 205). "One of the grounds of [the public] concern with the continued life and earning power of the individual is its interest in the prevention of pauperism. . . ." (at US p. 207). The interest of the state in those dependent on employees "for support" was again referred to in the companion case of *Mountain Timber Co. v. Washington*, 243 US 219, 243; 61 L ed 685, 699.

In dealing with the Longshoremen's and Harbor Workers' Compensation Act in particular, this Court has recognized that—

"... within its sphere the statute was designed to accomplish the same general purpose as the workmen's compensation laws of the States."

Crowell v. Benson, 285 US 22, 40; 76 L ed 598, 606.

And its application to the "relief . . . of dependents" was specifically referred to in *Baltimore & P. S. B. Co. v. Norton*, 284 US 408, 414; 76 L ed 367, 369-370.

Thus it seems abundantly clear that this Court has long understood that the general purpose of such laws, and of this law in particular, is to provide in the case of the death of an employee, for those *dependent*, or entitled so to depend, *on him for support*; and only statutory language which convincingly, clearly and precisely includes other persons would permit an extension of that purpose.

In the absence of such language in this Act, the Congress certainly never intended to provide, under the guise of workmen's compensation, a windfall payment

to one who, while perhaps technically a "widow,"⁽⁴⁾ had long since written off her initial matrimonial venture as a total loss and contracted a bigamous marriage to supplant it. There is no such language in this statute; on the contrary, as the Court of Appeals has decided, the plain language of the statute precludes consideration of the original desertion of the husband, if it was not the cause of the living apart *at the time of the husband's death*.

III. The reason why the parties were living apart at the time of the decedent's death is determinative of the wife's status.

It seems clear, as the Court of Appeals points out (R 25), that the precise language of the statute requires that the status of the parties as of the time of the employee's death be examined in order to determine the reason for their living apart *as of that time*. If there was any ambiguity on this point, it should at once be dispelled by an examination of the history of this provision in workmen's compensation acts.

⁽⁴⁾ She may not even be technically a "widow". Under the Federal Employees' Liability Act (45 USC § 51), which does not attempt a detailed definition of "surviving widow," a wife of a decedent who was living in adultery with another was not held to be a "widow". *Lytle v. Southern Railway-Carolina Division*, 171 S.C. 221, 171 SE 42, cert den 290 US 645, 78 L ed 560, 54 S. Ct. 63. See also *Folk v. U. S.*, 102 F Supp 736, 740, a Federal Tort Claims case under South Carolina wrongful death statute, reversed on other grounds *U. S. v. Folk*, 199 F 2d 889.

A. History of the statutory provisions in the state workmen's compensation acts from which the Longshoremen's and Harbor Workers' Compensation Act was taken.

When in 1911 various of the state legislatures⁽⁵⁾ enacted workmen's compensation acts, none of them contained precisely the language which now appears in Section 2 (16) of the Longshoremen's Act. The Massachusetts Act contained the following provision:

Part II. Section 7. The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

- (a) A wife upon a husband with whom she lives at the time of his death.

Like language was contained in the Michigan statute (Part II, Section 6).

In 1914, the Massachusetts Act was amended to read:

Part II. Section 7. The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

- (a) A wife upon a husband with whom she lives at the time of his death, *or from whom, at the time of his death, the department shall find the wife was living apart for justifiable cause or because he had deserted her.*

⁽⁵⁾ California (Laws 1911, chap. 399); Illinois (Laws 1911, chap. 314); Kansas (Laws 1911, chap. 218); Massachusetts (Laws 1911, chap. 751); Michigan (Laws 1912, P.L.3); Montana (Laws 1909, chap. 67); Nevada (Laws 1911, chap. 183); New Hampshire (Laws 1911, chap. 163); New Jersey (Laws 1911, chap. 95); Ohio (102 Ohio L. 524); Washington (Laws 1911, chap. 74); Wisconsin (Laws 1911, chap. 50). These statutes are collected in Labatt's *Master and Servant*, Second Edition, Volume 5 § 1852, pp. 5520-5644.

(Laws 1914, chap. 708 § 3; added phrase in italics).

The first federal act to follow this language generally was the Federal Employees' Compensation Act adopted in 1916 (39 Stat 742; 5 USC § 751 et seq.). Section 10(H) of that act contained the sentence:

The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death.

Eleven years later this was brought somewhat into line with the Massachusetts Act by the addition of the phrase:

. . . . or living apart for reasonable⁽⁶⁾ cause or by reason of his desertion.
(c. 110, 44 Stat 1086).

Insofar as there is any ambiguity in this provision because of failure to specifically make the phrase "at the time of his death" refer to the addition provided by the 1927 amendment, it will never receive judicial enlightenment.⁽⁷⁾

(6) The words "reasonable cause", rather than "justifiable cause", might well have been chosen in order to demonstrate an intended departure from the well settled judicial construction of "justifiable cause", the words later used in the Longshoremen's Act.

(7) This act is completely commission administered. Schneider says: "There are therefore no court interpretations of the dependency or other provisions of this act, and the Appeal Board not being bound by the rule of stare decisis, it is thought proper to set out here in full the dependency section of the Act, and it is hoped the practitioner's interpretation and application of the Act will conform with that of the Appeals Board as it from time to time expresses its conclusions." (Schneider, *Workmen's Compensation Law*, Vol. 9, § 1990, pp. 660-661).

And the point is unimportant (except to the Employees' Compensation Appeals Board which administers that Act), because when three weeks later the Congress passed the Longshoremen's Act it left no such loose ends, and followed completely the Massachusetts statute by reciting that—

"The term 'widow' includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for *justifiable cause* or by reason of his desertion *at such time.*" (Emphasis supplied).

There is therefore in the Massachusetts and the Longshoremen's acts, the same repetition of the words "at the time of his death," or "at such time," for complete clarity.

B. State decisions interpreting dependency provision prior to its adoption into the Longshoremen's and Harbor Workers' Compensation Act by the Congress preclude application of term "widow" to petitioner.

Between the adoption by Massachusetts of the 1914 amendment of the dependency provisions, and the adoption by the Congress in 1927 of the Longshoremen's and Harbor Workers' Act, the Massachusetts statute had been interpreted by the Supreme Court of that state in a manner consistent with the interpretation of the Fifth Circuit in the instant case.

The basic case under the Massachusetts statute is *In Re Newman's Case*, 222 Mass 563, 111 NE 359 (1916). This was a case where the living apart was found to be by the mutual consent of the husband and wife. However, the Court said:

"If we assume that when the deceased and his wife separated several years ago by mutual consent and that such separation was justifiable at that time because he was not earning enough to support his family, it also appears that *at the time of his death* his earnings had nearly doubled and she still continued to live away from him by mutual agreement." (emphasis supplied). (111 NE at 361).

Thus it clearly appears that although the separation might be justifiable (or desertion) at the time of the parting, it is the status at the time of death that counts; and if the living apart at the time of death is by mutual consent, the wife has no claim to compensation.

In re McDonald, 229 Mass 454, 118 NE 949, 950, the Court clearly distinguished between—

1. living apart by mutual consent, and
2. living apart through the fault of the wife,

and concluded that neither fell within the statutory requirement.

In 1919 the Michigan Workmen's Compensation Act was amended to agree with the Massachusetts Act,⁽⁸⁾ and shortly thereafter the case of the separated adulterous wife arose. Determining that "the question of dependency" is to be tested by conditions existing at the time of the accidental death of the employee, the court stated:

(8) *Kirkley v. General Baking Co.*, 217 Mich 207, 186 NW 482, decided in 1922, at which time, the Court said, "Massachusetts seems to be the only state in which a similar provision is contained in the Compensation Law". (186 NW at 485).

"Her status in living apart from him was fixed by her on or before 1917, when she married a man with whom she had previously been living in adulterous relations, and continued unaltered to the time of her husband's death."

Kimber v. Michigan Light Co., 229 Mich 663, 203 NW 110, 111, 112.

Meanwhile a similar statutory provision⁽⁹⁾ had received the same construction in Maine, and in a case substantially on all fours with the instant one. This was again a case of an adulterous wife, but this time one who had been deserted; and the Court said of her claim:

"If there were no other facts in the case than her marriage and his desertion, we think the presumption of her dependency could not be overcome by evidence, but is conclusive. Greenleaf, Ev. (16th Ed.) vol. 1 § 15; Nelson's Case, 217 Mass. 467, 470, 105 N. E. 357, Ann. Cas. 1915c, 862. The fact of whether she was or not actually a member of his family or dependent upon him for support would then be immaterial.

Another fact, however, appears in this case, which we think takes Mabel St. C. Scott out of the class conclusively presumed to be dependent and places her in the class that requires proof, and that is her act of adultery after being deserted by her husband. Her counsel do not deny that by that act she would be precluded from obtaining a divorce on the ground of desertion. We think the

⁽⁹⁾ The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:
'(a) A wife upon a husband with whom she lives, or from whom she was living apart for a justifiable cause, or because he had deserted her or upon whom she is dependent at the time of the accident.'

The 1912 Rhode Island Act, as amended in 1917 (Laws 1917, c. 1534, § 3) is similar, but no cases important to the present controversy appear prior to the adoption of the Longshoremen's and Harbor Workers' Act in 1927.

word "desertion" as used in this connection has its usual meaning when used in connection with marital relations. Desertion as a ground for divorce must continue up to the time of filing the libel, and involves not only the willful abandonment without just cause, or the consent of the other party, but also the continued refusal to return without justification. If the deserted party at any time furnishes just cause for the one deserting refusing to return, or by his or her acts consents to the separation, desertion as a willful and unjustifiable abandonment of one party by the other and as a ground of divorce ceases. *Ford v. Ford*, 143 Mass. 577, 10 N. E. 474; *Whippen v. Whippen*, 147 Mass. 294, 17 N. E. 644. Without a conclusive presumption in her favor, Mabel St. C. Scott, though she was one of the deceased's next of kin, or even if within the meaning of the act was still a member of his family, has no standing in this case, as it is admitted that she was not dependent upon him in fact."

Scott's Case, 104 Atl 794, 796.

This then was the status of decisions interpreting this section when the Congress adopted it in 1927. Following the recognized rule of statutory construction that Congress will be deemed to have adopted earlier judicial constructions of borrowed state legislation (*Hartford Accident and Indemnity Co. v. Hoage*, 85 F 2d 411, 413, CA DC, 1936, and cases cited),⁽¹⁰⁾ the

(10) This case refers to the fact that in the main the Longshoremen's Act followed the New York Law. The dependency provisions, however, followed the laws of the states referred to above. See citations in note 4 of *Weeks v. Behrend*, 135 F 2d 258, CA DC, 1943.

Because of the applicability of this more specific rule of construction, we believe that the petitioner's effort to apply the *pari materia* argument (Petitioner's Brief, pp. 14-15) is inappropriate. On the Petitioner's improper application of the rule of *pari materia* see *United States v. Stewart*, 311 US 60, 69; 85 L ed 40, 48; 61 S Ct 102.

doctrines of these cases are controlling in the interpretation of the dependency provisions of the Longshoremen's Act.

The cases point out these rules to be applied:

1. The status of the parties at the death of the employee—and regardless of prior relations between them—is the important factor.
2. The reason for living apart at the time of death must be solely the result of the matrimonial misconduct of the husband; it cannot be either the fault of the wife, or by their mutual consent.⁽¹¹⁾
3. A separation which in its inception arose out of the matrimonial misconduct of the husband, will not fall within the terms of the statute if (1) she later indulges in matrimonial misconduct herself, or (2) continues the separation by mutual consent.

IV. The analogy of separate maintenance and support cases.

Before applying these rules to the facts of the instant case, we shall comment briefly on the petitioner's reference to the wife's immunity from marital misconduct once the husband's desertion has occurred. (Petitioner's Brief, pp. 18-21).

In the first place, the use of the phrase "at such time" at the end of the statutory definition presupposes a possible change in circumstances. If nothing

⁽¹¹⁾ *Weeks v. Behrend*, 135 F 2d 258, 259, citing Massachusetts, Michigan and Maine cases.

which the wife did, while living apart, could change the status of the desertion or other initial "justifiable cause," then the words "at such time" would have served no purpose.⁽¹²⁾

Thus, in dealing with a statute where changing relationships are necessarily assumed, we cannot relate its meaning to concepts which are necessarily final in character, such as divorce. If any analogy is either necessary or desirable, we suggest a reference to cases dealing with separate maintenance and support.

Such cases hold that the "right to continued separate maintenance may be forfeited by the wife for her misconduct, as, for example, adultery" (*Atkinson v. Atkinson*, 233 Ala 125, 170 So 198, 199, 200; *Gilson v. Gilson*, 121 N.J.Eq. 342, 189 A 370). And in non-support cases, the support order will be vacated because of the subsequent adultery of the wife, even though the original support order was predicated on similar and continuing misconduct on the part of the husband (*Commonwealth ex rel Brobst v. Brobst*, 173 Pa Super 171, 96 A 2d 194-195; *Commonwealth ex rel Crabb v. Crabb*, 119 Pa Super 209; 180 A 902, 903).

V. The petitioner's reasons for living apart at the time of death of the decedent required the rejection of her claim by the Deputy Commissioner.

These are the uncontested facts concerning the living apart by the petitioner as of the time of the decedent's death:

(12) The courts should not rewrite the statute even supposing it would serve humanitarian purposes of the act. *Pillsbury v. United Engineering Company*, 342 US 197, 200; 96 L ed 225, 229.

1. In 1940, fifteen years subsequent to her desertion by the decedent and eleven years prior to his death, the petitioner entered into a bigamous marriage with Jimmy Lewis Fuller, who divorced her nine years later (R 8).
2. In 1951, approximately three weeks prior to his injury and four weeks prior to his death, the deceased employee called upon Julia Thompson at the home of their daughter, and asked the petitioner if she would "take him back." She refused (R 10).
3. At the time of the decedent's death, the petitioner did not have any intentions of ever again living with Otis Thompson and resuming the relationship of husband and wife (R 10).

It is therefore clearly apparent that, at the time of the deceased employee's death, the petitioner was not living apart from him because of his desertion 25 years earlier. She regarded their relationship as husband and wife as having long-since ended. She had entered into a new marital venture with Fuller, which she must have assumed was effective. There was a marriage ceremony, and she adopted the name of Fuller (R 8-9).

She certainly refused to acknowledge that she was then the wife of the decedent; she not only refused to again resume that relationship, but she had no intention of ever again living with him.

The decedent and the petitioner were living apart in 1951 as the result of the petitioner's actions and intentions, not the decedent's. In 1951 she was living apart because she chose to do so; or at the very least

it was a matter of mutual consent⁽¹³⁾ and agreement between them. She was living apart and liking it; and she cannot now claim the benefit of a statute which assumes that she was a "widow" only if there presently existed a relationship which she had forcefully controverted by her remarriage, a relationship which at the time of decedent's death she would not accept, and which she did not desire ever to accept again.⁽¹⁴⁾

CONCLUSION

It is respectfully submitted that the Deputy Commissioner, the District Court, and the Court of Appeals were right in rejecting the petitioner's claim. At the time of the deceased employee's death, her living apart from him was the result of her own past actions and present intentions, not his. His desertion had continued as a cause of the separation not later than the date when it became an advantage to her—when his absence permitted the marriage to Fuller. At the time of his death it was clearly her purpose to continue the separation forever.

The statute, in requiring an examination of the status of the parties *at the time of death*, necessarily infers that that status will change between the time of separation and the time of death. It did so here; and the 1925 separation, although once within the

(13) *Weeks v. Behrend*, 135 F 2d 258, CA DC, 1943.

(14) States with less restrictive definitions of widow-dependents under workmen's compensation acts arrive at similar results. See, e.g., *Harden v. United States Casualty Co.*, 175 SE 404, 405, Ga Court of Appeals, 1934.

terms of the statute, became prior to 1951 a living apart for which the petitioner was as much responsible as the decedent, or perhaps more so. With the parties in that status, the statute denies her the position of a "widow," and requires the rejection of her claim.

The decision of the Court of Appeals was right, and these respondents respectfully submit that it should be affirmed.

Respectfully submitted,

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IN THE

HAROLD B. WILLEY, Cler

Supreme Court of the United States
OCTOBER TERM, 1953

No. 352

JULIA THOMPSON,
Petitioner,

vs.

RICHARD P. LAWSON,

As Deputy Commissioner of the United States
Bureau of Employees' Compensation, Sixth
Compensation District, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT.

PETITION FOR REHEARING

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1953

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JULIA THOMPSON,
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vs.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT.

PETITION FOR REHEARING

To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:

Respondents Gulf Florida Terminal Company, Incorporated, and American Mutual Liability Insurance Company respectfully petition this Honorable Court for rehearing on the Court's order dated November 16, 1953, granting petition for certiorari in the above entitled cause; and pray the Court that on rehearing and reconsideration, the petition for writ of certiorari be denied.



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CARD 3

GROUNDS FOR REHEARING AND RECONSIDERATION

The order granting petition for certiorari was filed before respondents' brief in opposition was due.

The petition in this case was filed September 28, 1953. The petitioner did not serve these respondents within ten days from the filing of the petition as required by Rule 38 of this Court; but delayed service on these respondents until October 26, 1953, as shown by receipt of service filed with the Office of the Clerk. Thus under Rule 38, respondents' brief in opposition was not due until November 25, 1953,—or nine days subsequent to the order of this Court granting certiorari. The Clerk inadvertently scheduled the petition for conference prematurely.

This error deprived these respondents of their day in Court on the petition for writ of certiorari, and we respectfully suggest that they should be heard.

These respondents (as distinguished from the nominal respondent, Deputy Commissioner Richard P. Lawson, represented by the Solicitor General) have a substantial pecuniary interest in the outcome of this litigation. They are the real parties to the litigation, and we respectfully request the Court to now consider the objections to the grant of certiorari which they were prepared to timely file.

GROUNDS FOR DENYING THE WRIT

On October 16, 1953, the Acting Solicitor General filed in this Court on behalf of the respondent Lawson a Memorandum in which the government, in effect, joined in the petitioner's request for certiorari. This was never served on these respondents, and we did not know that it had been filed until we obtained a copy from the Clerk's Office subsequent to this Court's grant of certiorari.

In answer to that Memorandum, we might agree that there were conflicts between prior decisions of the Fifth Circuit and those of the other circuits cited; but we do not agree that the legal basis for any such conflict ruled, or should rule, the decision *in this case*.

In other words, we consider that the instant case would probably have been decided in the Ninth, Second and Third Circuits exactly as it was decided in the Fifth. And we hereto append our Brief in Opposition, as previously prepared for filing in this Court within the time allowed by Rule 38, demonstrating this proposition.

CONCLUSION

We respectfully submit that these respondents should be heard in opposition to the petition for certiorari; and that review by certiorari be reserved for some case in which the conflict in decisions recited by petitioner and respondent Lawson is more real than apparent. Consequently, these respondents respectfully pray that the order of this Court granting the petition for writ of certiorari to the Court of Appeals for the Fifth Circuit be reheard and vacated, and that the petition be denied.

Dated: November, 1953.

Respectfully submitted,

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Tampa, Florida

CERTIFICATE

I, GEORGE W. ERICKSEN, of counsel for Gulf Florida Terminal Company, Incorporated, and American Mutual Liability Insurance Company, respondents herein, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

GEORGE W. ERICKSEN,

Attorney for Respondents

Gulf Florida Terminal Company,
Incorporated, and American
Mutual Liability Insurance
Company.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1953

No.

JULIA THOMPSON,
Petitioner,

vs.

RICHARD P. LAWSON,

As Deputy Commissioner of the United States
Bureau of Employees' Compensation, Sixth
Compensation District, et al.,
Respondents.

ON PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH
CIRCUIT

BRIEF FOR RESPONDENTS
GULF FLORIDA TERMINAL COMPANY,
INCORPORATED,
and
AMERICAN MUTUAL LIABILITY INSURANCE
COMPANY
IN OPPOSITION

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IN THE

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BRIEF FOR RESPONDENTS
GULF FLORIDA TERMINAL COMPANY,
INCORPORATED,
and
AMERICAN MUTUAL LIABILITY INSURANCE
COMPANY
IN OPPOSITION

Opinions Below

No opinion was rendered by the District Court.
The opinion of the Court of Appeals (R 22 et seq.) is
not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered June 30, 1953. The petition for a writ of certiorari was filed September 28, 1953, but not served on these respondents until October 26, 1953. The jurisdiction of this Court has been invoked by petitioner under 28 USC Section 1254(1).

RESTATEMENT OF THE QUESTION PRESENTED

We contend that the question as presented by the petitioner ignores one step in the proceedings; and, consequently, infers a conflict of decisions where none actually exists.

The Deputy Commissioner in this workmen's compensation case found against the claimant-petitioner, and in so finding determined as an ultimate fact that the claimant—

"... was not living apart from Otis Thompson (the deceased employee) for justifiable cause or by reason of his desertion at the time of his death." (R 11);

and consequently was not a widow⁽¹⁾ entitled to dependency benefits under the Act⁽²⁾.

The Deputy Commissioner's determination of such non-jurisdictional facts is not to be disturbed on appeal if supported by evidence⁽³⁾.

(1) As defined in Section 902(16), Title 33, United States Code.

(2) Longshoremen's and Harbor Workers' Compensation Act, Title 33, USC, Sections 901-950.

(3) *Associated Operating Co. v. Lowe*, 52 F. Supp. 550, 552, aff'd per curiam, 138 F. 2d 916, cited by petitioner, pp. 4, 6 of petition; *Crowell v. Benson*, 285 US 22, 46; 76 L. Ed. 598, 608; *Cardillo v. Liberty Mutual Insurance Co.*, 330 US 469, 477-478; 91 L. Ed. 1028, 1036.

Consequently, the real question is:

According to the Deputy Commissioner's findings the weight to which they are entitled as a matter of law, was there any evidence to support the ultimate finding that the claimant "was not living apart from Otis Thompson for justifiable cause or by reason of his desertion at the time of his death"?

STATUTE INVOLVED

The statute involved is the Longshoremen's and Harbor Workers' Compensation Act, Sections 901-950, Title 33, United States Code.

Section 902(16) defines the term "widow" as follows:

"The term 'widow' includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time."

The Sections of the Act determining the finality of the Deputy Commissioner's findings of fact are Section 919, Subsection (a), and Section 921, Subsection (b) (*Cardillo v. Liberty Mutual Insurance Co.*, 330 US 469, 477), the pertinent portions of which are as follows:

Section 919(a):

"Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the commission at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim."

Section 921(b):

"If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the District Court of the United States for the District of Columbia if the injury occurred in the District)."

STATEMENT OF THE CASE

In commenting on and supplementing the petitioner's statement, we first call the Court's attention to the failure of the petitioner to bring up the record in the hearing before the Deputy Commissioner. Consequently, the facts in the case are those contained in the Deputy Commissioner's Findings of Fact, pp. 7-11 of the transcript of record.

The petitioner's elliptical treatment of those facts has ignored at least one finding which we feel was important to the decision of the case—

"... that Julia Thompson did not have any intentions of ever living with Otis Thompson and resuming the relationship of husband and wife . . ." (R 10).

On the basis of this and other findings, the Deputy Commissioner determined that, as of the time of the death of Otis Thompson, the employee, the petitioner Julia Thompson was living apart from him, not by reason of any prior act of his, but by virtue of her own voluntary decision to live apart from the decedent.

ARGUMENT

As we understand the question actually involved in this case, the District Court and the Court of Appeals could not have reversed the Deputy Commissioner's determination of fact, because there was abundant underlying support for that determination in the record which the petitioner presented for consideration by the courts.

FINDINGS OF DEPUTY COMMISSIONER WERE SUPPORTED BY EVIDENCE

The petitioner here (claimant-appellant below) did not bring up the record in the proceedings before the Deputy Commissioner. Consequently, her argument against the Deputy Commissioner's finding is necessarily limited to the allegation that the detailed specific findings, which we must assume were sufficiently supported by evidence, did not warrant the factual conclusion drawn by the Deputy Commissioner. He found—

"... at a time approximately three weeks before his injury on June 7th, 1951, Otis Thompson called upon Julia Thompson at the home of their daughter Lucille; that during the time of that visit Otis Thompson asked Julia Thompson if she would 'take him back' and Julia Thompson refused; that Julia Thompson did not have any intentions of ever again living with Otis Thompson and resuming the relationship of husband and wife; that at the time of his injury and death the claimant, Julia Thompson, was the lawful wife of Otis Thompson; that from November 1925 until June 1940 the claimant, Julia Thompson, was living apart from Otis Thompson by reason of his desertion; that Julia Thompson was not living apart from Otis Thompson at the time of his death for justifiable cause or by reason of his desertion . . ." (R 10)

There was no series of similar, uncontroverted findings in any of the cases cited by petitioner as being in conflict with the instant case. As a matter of fact, all of those cases rely either on the absence of such findings or on contrary findings. Briefly reviewing them, it is apparent that as to the principal proposition of the weight to be given to a Deputy Commissioner's determination, they are in accord, and not in conflict, with the instant case:

Associated Operating Co. v. Lowe, 52 F. Supp. 550, 551, aff'd per curiam 138 F. 2d 916, CA 2, 1943.

Deputy Commissioner's order and findings upheld.

"The finding, that the said defendant was living apart from the deceased, for justifiable cause, if as I believe was a finding of fact, is as a fact supported by the evidence, and should not be disturbed, . . ." (at p. 552)

Moore Dry Dock Co. v. Pillsbury, 169 F. 2d 988, CA 9, 1948.

Deputy Commissioner's order upheld. No findings of applicable fact by Deputy Commissioner. It was found either by Court or Commissioner that at all times after original desertion by deceased, "claimant lived apart from decedent by reason of his desertion." (at p. 989).

Travelers Ins. Co. v. Norton, 34 F. Supp. 740, DC, ED Pa. 1940.

Deputy Commissioner's order and findings upheld.

"The commissioner's award was predicated upon the finding that Pauline S. Peterson, the deceased's lawful wife, at the time of his death was living apart from him for justifiable cause and by reason of his desertion." (at p. 742)

"Jurisdictional facts not being involved in the foregoing findings, if supported by competent evidence they must be upheld." (at p. 741).

Completing the analysis, the above cases hold that:

- (1) The Deputy Commissioner's findings that the claimant was not, at the time of decedent's death—
 - (a) living apart from decedent for justifiable cause, or
 - (b) by reason of his desertion;
 will not be disturbed if there is evidence to support them; and
- (2) In particular, the courts will not disturb those findings merely because of evidence of intervening immoral acts on the part of the claimant.

The instant case is merely the opposite side of the same coin. The Deputy Commissioner found that the claimant failed to prove her case⁽⁴⁾ that she was within the statutory requirements at the time of the decedent's death. She failed, in part at least, because of positive evidence that—

"... at a time approximately three weeks before his injury on June 7th, 1951 . . . Otis Thompson asked Julia Thompson if she would 'take him back' and Julia Thompson refused; that Julia Thompson did not have any intentions of ever again living with Otis Thompson and resuming the relationship of husband and wife . . ." (R 10).

⁽⁴⁾ In Workmen's Compensation cases the burden of proof is on the claimant. *In re Fierro's Case*, 111 NE 957, Mass., 1916; *Green v. Crowell*, 69 F. 2d 762, CA 5, 1934, cert. den. 293 US 554.

These facts have nothing to do with Julia Thompson's morality while living apart from Otis Thompson. They do answer the question—

Did Julia Thompson's involuntary separation from the decedent in November 1925, for which she had justifiable cause by reason of his desertion, become *voluntary* by reason of subsequent events?

The answer is that it did⁽⁵⁾; and the Deputy Commissioner correctly so found.

We respectfully submit that there is no conflict in law between this case and those of the ninth, third and second circuits cited by petitioner. As the decision in this case by the Court of Appeals points out, the fact

(5) Compare findings and conclusion in *Broadbent's Case*, 134 NE 632, 634-635, Mass. 1922, where failure to accede to husband's request that wife accompany him to matrimonial domicile was held to demonstrate lack of present justifiable cause. Our reference to Massachusetts cases arises out of the adoption by Congress in 1927 in the Longshoremen's & Harbor Workers' Act of the phraseology of the Massachusetts Workmen's Compensation Law, St. 1911 c. 751, part 2, § 7, as amended by St. 1914, c. 708, § 3. Pertinent provisions are:

"§32. (a) A wife upon a husband with whom she lives at the time of his death, or from whom, at the time of his death, the department shall find the wife was living apart for justifiable cause or because he had deserted her. The findings of the department upon the questions of such justifiable cause and desertion shall be final."

Outside of a few other New England states, such as Rhode Island, Vermont and Maine, and Michigan, the dependency provisions of the earlier acts in other states were different from the Federal Act. While, in general, the Federal Act followed the New York Workman's Compensation Act (*Hartford Accident & Indemnity Co. v. Hoage*, 85 F. 2d 411, CA, DC, 1936, at p. 413) in respect to this dependency definition it follows Massachusetts. However, the same rule of construction, that Congress will be deemed to have adopted earlier judicial constructions of borrowed state legislation, applies. E.g., Massachusetts cases were cited in *Weeks v. Behrend*, 135 F. 2d 258, CA DC.

to be decided is set up by the statute, which requires a determination of the purpose in the wife's living apart as of the date of decedent's death. The Deputy Commissioner must fit the facts of each case into the ultimate statutory fact.

Under these circumstances, in one case the intervening acts of the wife—whether moral, amoral or immoral—may demonstrate that she would never again, regardless of the urgency of the decedent's invitation, resume the husband-wife relationship. If so, the fault, originally his, now becomes hers. That is the instant case.

In a precisely similar case, the intervening acts of the wife—however immoral—may fail to demonstrate that the choice of living apart is now her decision, not his. Those are the third, second and ninth circuit cases.

We believe that future cases should continue to be resolved on such factual bases by the Deputy Commissioner, and that the petitioner's efforts to place such determinations in a "conclusion of law" strait-jacket should fail.

LOCAL LAW OF DIVORCE NOT APPLICABLE

Although the conflict of decisions on which the petitioner relies as a reason for granting the writ is absent, there is a conflict in basic legal propositions within the petition itself.

On page 4 of the petition, the argument is made that there should be a uniformity of interpretation of the Longshoremen's and Harbor Workers' Compensation Act throughout the United States; and on pages

6 and 7, the petition takes the contrary position that definitions of desertion in the local law of divorce should control the factual determination.

Without discussing the anomaly of this position in detail, we deem it to have been decided that:

- (1) The determination of the *marriage* status will be resolved under local law, absent a more complete definition in the Federal Act. *Green v. Crowell*, 69 F. 2d 762, CA 5, cert. den. 293 US 554; *Bolin v. Marshall*, 76 F. 2d 668, cert. den. 296 US 573. That must be so because the Federal Act in this respect depends on a *legal* relationship, that of husband and wife, which necessarily depends on the law of the state where it is claimed to exist.
- (2) The determination of "desertion" and "justifiable cause" is *factual*, and although they may have acquired peculiar meaning as words of legal art, they are not dependent on the local law of divorce for their meaning. *In re Newman's Case*, 111 NE 359, 361, Mass., 1916. Furthermore, as we have previously pointed out, if a guide to the application of those words to particular factual situations is necessary, the courts would naturally look for definitions to the jurisdiction from which they were borrowed (Massachusetts) and not to the local law of the action. *Hartford Accident & Indemnity Co. v. Hoage*, 85 F. 2d 411, 413, CA DC, 1936; *Marshall v. Andrew F. Mahony Co.*, 56 F. 2d 74, 77, CA 9, 1932.

CONCLUSION

We contend that on adequate analysis, the cases in the courts of appeals, which petitioner contends are in conflict, are actually in agreement on basic legal propositions; and that, therefore, the basic reason advanced by petitioner for granting the writ fails. The petition for writ of certiorari should be denied.

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SUPREME COURT OF THE UNITED STATES

No. 352.—OCTOBER TERM, 1953.

Julia Thompson, Petitioner,
v.
Richard P. Lawson, as Deputy
Commissioner of the United
States Bureau of Employees
Compensation, etc., et al. } On Writ of Certiorari
to the United States
Court of Appeals for
the Fifth Circuit.

[April 5, 1954.]

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

On June 15, 1951, Otis Thompson died from injuries suffered while loading a ship for his employer. Two women sought a death benefit under the Longshoremen's and Harbor Workers' Compensation Act, each claiming to be his "widow." The Deputy Commissioner denied both claims, that of one woman on the ground that she was not the lawful wife of the decedent, and that of the other because at the time of Otis' death she was living apart from him not "by reason of his desertion," 33 U. S. C. § 902 (16). On a review of the latter dismissal, the District Court sustained the Deputy Commissioner's order, and the Court of Appeals for the Fifth Circuit affirmed. 205 F. 2d 527. In doing so, that court rejected contrary decisions of the Courts of Appeals for the Second and Ninth Circuits, *Associated Operating Co. v. Lowe*, 138 F. 2d 916, *Moore Dry Dock Co. v. Pillsbury*, 169 F. 2d 988. We granted certiorari to resolve this conflict. 346 U. S. 921.

The Deputy Commissioner made these findings. Otis and Julia Thompson were married in 1921, and lived together as husband and wife until November 1925, when Otis deserted her. They never lived together again, and

he never contributed anything to the support of Julia or their two children, nor did she ever endeavor to secure such support. Meanwhile Otis had taken up with one Sallie Williams, and they went through a marriage ceremony in 1929. Julia, in turn, found another mate, one Jimmy Fuller, whom she "married" in 1940. Thereafter she was known as Julia Fuller. She was formally divorced from Fuller in 1949. Shortly before his death, Otis asked Julia to "take him back," but she refused, having no intention of ever again living with him and resuming the relationship of husband and wife.

The single, unentangled question before us is whether, on these unchallenged facts, Julia was at the time of Otis' death in 1951, his statutory "widow," as that term is described by Congress in the Longshoremen's Act: "The term 'widow' includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time," 33 U. S. C. § 902 (16). We agree with the court below that since she was not at the time of her husband's death living apart from him "by reason of his desertion," she was not a "widow" within the scope of this provision. Whatever may have been the situation prior to her "marriage" to Jimmy Fuller in 1940, it is clear that after that date she lived as the wife of Jimmy Fuller, held herself out as his wife, and had severed all meaningful relationship with the decedent.

We do not reach this conclusion by assessing the marital conduct of the parties. That is an inquiry which may be relevant to legal issues arising under State domestic relations law. Our concern is with the proper interpretation of the Federal Longshoremen's Act. Congress might have provided in that Act that a woman is entitled to compensation so long as she is still deemed to be the lawful wife of the decedent under State law, as, for ex-

ample, where a foreign divorce obtained by her is without constitutional validity in the forum State. But Congress did not do so. It defined the requirements which every claimant for compensation must meet. Considering the purpose of this federal legislation and the manner in which Congress has expressed that purpose, the essential requirement is a conjugal nexus between the claimant and the decedent subsisting at the time of the latter's death, which, for present purposes, means that she must continue to live as the deserted wife of the latter. That nexus is wholly absent here. Julia herself, by her purported remarriage, severed the bond which was the basis of her right to claim a death benefit as Otis' statutory dependent. The very practical considerations of this Compensation Act should not be subordinated to the empty abstraction that once a wife has been deserted, she always remains a deserted wife, no matter what—the no matter what in this case being the wife's conscious choice to terminate her prior conjugal relationship by embarking upon another permanent relationship.

The judgment is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 352.—OCTOBER TERM, 1953.

Julia Thompson, Petitioner,
v.
Richard P. Lawson, as Deputy
Commissioner of the United
States Bureau of Employees
Compensation, etc., et al. } On Writ of Certiorari
to the United States
Court of Appeals for
the Fifth Circuit.

[April 5, 1954.]

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS
and MR. JUSTICE MINTON concur, dissenting.

Petitioner's husband, a longshoreman, was killed in 1951 on a job governed by the Longshoremen's and Harbor Workers' Compensation Act. Petitioner was not then living with her husband and had not done so since he deserted her and their two children in 1925. Petitioner went through a marriage ceremony with another man in 1940 living with him as his wife until 1949 when they were divorced. Of course this marriage was invalid and petitioner remained the wife of her husband until he was killed. The Court now holds as a matter of law that petitioner's second "marriage" amounts to a forfeiture of her right to recover compensation under the Act as a widow. In so holding, the Court follows decisions of the Fifth Circuit Court of Appeals.¹ The Second Circuit Court of Appeals and the Ninth have held to the contrary.² I agree with the Second and Ninth Circuits.

Not a word in the Compensation Act suggests that the deserted widow of a deceased longshoreman automatically

¹ *Ryan Stevedoring Co. v. Henderson*, 138 F. 2d 348; *American Mutual Liability Ins. Co. v. Henderson*, 141 F. 2d 813.

² *Associated Operating Co. v. Lowe*, 138 F. 2d 916, affirming 52 F. Supp. 550; *Moore Dry Dock Co. v. Pillsbury*, 169 F. 2d 988.

forfeits all right to statutory compensation because she has lived with a man other than her husband. What the Act actually does is to entitle a widow to compensation if at the time of her husband's death she is either: (1) living with him; (2) dependent upon him for support; (3) living apart from him for justifiable cause; (4) living apart from him by reason of his desertion. Obviously these issues cannot be decided without hearing evidence and determining facts. The Act vests deputy commissioners, not courts, with power "to hear and determine all questions in respect of such claim." 33 U. S. C. § 919 (a). And their findings of fact when supported by substantial evidence are conclusive on courts.³

Here there were only two factual issues presented to the Deputy Commissioner. Was the wife living apart from her husband for "justifiable cause"? Was she living apart from him because of his "desertion"? I think there was evidence before the Deputy Commissioner on which he could have fairly decided these questions of fact either way. He made findings and entered an order against the petitioner, but it is admitted that he did so because he felt bound by prior holdings of the Fifth Circuit that an attempted marriage by a wife barred her recovery of compensation as a matter of law. The Court now affirms the judgment although the Deputy Commissioner has never passed on the factual issues of whether the wife's living apart from her husband was either "justifiable" or by reason of his "desertion." That the Court treats its holding as one of statutory construction cannot obscure the actual effect of what it is doing. The Court is taking from the deputy commissioners their

³ *Voehl v. Indemnity Ins. Co.*, 288 U. S. 162, 166; *Parker v. Motor Boat Sales, Inc.*, 314 U. S. 244, 246; *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U. S. 504, 507-508.

congressionally granted power to determine from all the facts and circumstances whether a widow is entitled to compensation.

I would reverse with directions to remand the cause to the Deputy Commissioner to determine, free from judicial compulsion, whether, as a fact, petitioner's living apart was for "justifiable cause" or on account of her husband's "desertion." If either of these issues should be decided in favor of the petitioner, she is entitled to compensation.